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Supreme Court, U.S.
FILED

10-867 DEC 30 2010

No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CARL J. MAYER, PETITIONER

v.

BILL BELICHICK; THE NEW ENGLAND PATRIOTS;
NATIONAL FOOTBALL LEAGUE

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the ruling of the Third Circuit below (in accord with the Seventh Circuit) that ticket-holders to professional football games only have a revocable license and not contract rights conflict with rulings by lower courts in other Circuits holding that ticket-holders indeed have contract rights and a full panoply of legal remedies such as statutory consumer protections?

Has the Third Circuit impermissibly intruded on state's rights by deciding a substantive issue of New Jersey state law relating to contract and consumer protection before the New Jersey State Supreme Court has ruled on the issue?

Should the United States Supreme Court revisit its opinion in *Marrone v. Wash. Jockey Club of D.C.*, 227 U.S. 633 (1913) holding that patrons at sporting events have no contractual rights and only purchase a revocable license in light of the fact that it is based on an ancient and outmoded British common law doctrine no longer applicable to the complex financial world of modern professional sports, particularly the National Football League which is a $6.3 billion annual business with millions of customers?

Does the Third Circuit opinion conflict with the premise of *American Needle, Inc. v. National Football League, et al.*, 130 S.Ct. 2201 (2010) that even though the NFL is a purportedly self-regulating league, it is not exempt from the law?

Can a purportedly self-regulating professional sporting league pre-empt federal and state law in what the Third

Circuit deems a novel and unprecedented case, thereby denying aggrieved ticket-holders access to the courts and thwarting any legal redress on an issue of national importance for millions of consumers?

Does the federal RICO statute protect consumers of professional sporting events who were fraudulently induced to pay for season ticket packages only to watch games that were rigged in violation of NFL rules?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (App.1a-31a) is reported at 605 F.3d 223 (3rd Cir. 2010). The Order of the U.S. Court of Appeals for the Third Circuit (App. 40a) denying Mayer's Petition for Panel Rehearing and Rehearing En Banc is not reported.

The opinion of the United States District Court for the District of New Jersey (App. 32a-39a) is reported at 2009 WL 792088 D.N.J. 2009.

JURISDICTION

The Third Circuit entered judgment for defendants on May 19, 2010. App.1a. The Third Circuit denied Mayer's Petition for Panel Rehearing and Rehearing En Banc on September 1, 2010. App. 40a. The Honorable Justice Alito granted Mayer's petition for an extension of time to file this petition until December 30, 2010. This Court has jurisdiction under 28 U.S.C. 1254(1). This Court's jurisdiction is further invoked as there is a difference of opinion between the Third Circuit and this Court. This case implicates this Court's holding in American Needle, Inc. v. National Football League, et al., 130 S.Ct. 2201 (2010) where this Court held that the self-governing nature of the NFL does not exempt it from applicable laws, a question that arose below where the Third Circuit held, in part, that a ticket-holder has no remedy at law for contract or fraud because of the NFL's self-regulating nature.

RELEVANT PROVISIONS INVOLVED

18 U.S.C. §1962

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or

the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

N.J.S.A., 2C:41-2

a. It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which he has participated as a principal within the meaning of N.J.S. 2C:2-6 to use or invest, directly or indirectly, any part of the income, or the proceeds of the income, in acquisition of any interest in, or the establishment or operation of any enterprise which is engaged in or the activities of which affect trade or commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer or of assisting another to do so, shall not be unlawful under this section, provided that the sum total of the securities of the issuer held by the purchaser, the members of his family, and his or their accomplices in any

pattern of racketeering activity or in the collection of an unlawful debt does not amount in the aggregate to 1% of the outstanding securities of any one class, or does not, either in law or in fact, empower the holders thereof to elect one or more directors of the issuer, provided further, that if, in any proceeding involving an alleged investment in violation of this section, it is established that over half of the defendant's aggregate income for a period of 2 or more years immediately preceding the investment was derived from a pattern of racketeering activity, a rebuttable presumption shall arise that the investment included income derived from a pattern of racketeering activity.

b. It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in or activities of which affect trade or commerce.

c. It shall be unlawful for any person employed by or associated with any enterprise engaged in or activities of which affect trade or commerce to conduct or participate, directly or indirectly, in the conduct of the enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

d. It shall be unlawful for any person to conspire as defined by N.J.S. 2C:5-2, to violate any of the provisions of this section.

N.J.S.A. 56:8-2

> The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice; provided, however, that nothing herein contained shall apply to the owner or publisher of newspapers, magazines, publications or printed matter wherein such advertisement appears, or to the owner or operator of a radio or television station which disseminates such advertisement when the owner, publisher, or operator has no knowledge of the intent, design or purpose of the advertiser.

Introduction

The fundament of this case is whether the National Football League and its teams can continue to deny any federal or state statutory rights (especially consumer protections) or common law rights to aggrieved ticket-holders/consumers.

The ruling of the court below, the Third Circuit Court of Appeals, was premised largely on an ancient common law doctrine dating to nineteenth century England holding that a ticket to a sporting event is

merely a revocable "license". As a result, ticket-holders/consumers have no legal rights or remedies.

Unlike purchasers of virtually any other good or service, ticket-holders/consumers have no contract and therefore no contract rights under this ancient doctrine. Nor do patrons of professional football in America have any protections from fraud, racketeering, consumer fraud or unjust enrichment and they do not enjoy any of the bevy of statutory and common law safeguards that consumers of other products receive.

This Court is asked to grant certiorari to resolve a conflict between this ruling in the Third Circuit (in accord with the Seventh Circuit) and rulings by lower courts in other Circuits holding that tickeholders/consumers indeed have contractual rights and a full panoply of legal remedies.

This Court is also asked to review whether the Third Circuit impermissibly violated state's rights by deciding what the New Jersey Supreme Court would rule before the Court actually resolved this question.

This Court is also asked to grant the petition so it may review two of its prior holdings to determine if they conflict with the opinion below or whether outmoded precedent needs to be modernized.

Finally, this Court should grant review because this case implicates an issue of national importance affecting millions of consumers who patronize America's most popular professional sport.

After granting a highly unusual hour-long oral argument in this matter, the Third Circuit Court of Appeals stressed repeatedly in its opinion that this case is novel and unprecedented:

- "This highly unusual case..." App. 2a.
- "Although the factual circumstances and claims before this Court appear to be rather unique..." App.20a.
- "... unusual and even unique circumstances presented by this appeal." App. 14a.
- "It does appear that the various (and numerous) decisions cited by the District Court and the parties on appeal are distinguishable from the highly unusual (and even unique) circumstances present here. Simply put, no one in the past has ever brought a legal action quite like this one." App. 14a.

In other words, the Circuit court found that all the decisions cited by the District Court and by the parties on appeal could be distinguished from this case. App. 14a.

The United States Supreme Court should grant the petition precisely because this case is sui generis and at the same time implicates issues of national importance to millions of Americans.

At stake are the rights of millions of consumers who faithfully pay huge sums of money to see honest professional football contests. This is the Court of last resort and this petition for a writ of certiorari constitutes the last chance for the United States Government to protect the integrity of professional football.

STATEMENT

This case is about "Spygate."

"Spygate," as this scandal is known in the popular press throughout America (and likely the

world) involves perhaps the most notorious, long-standing and systemic scheme of cheating in any professional sport.

The admitted culprits in this case are the New England Patriots football team, under the direction of coach Bill Belichick. After being caught by members of the New York Jets football team videotaping Jets signals during a game between the two teams on September 9, 2007 the Patriots and their head coach apologized for illegally videotaping the signals of opposing football teams; the following week the NFL found the Patriots guilty of violating several applicable NFL rules by engaging in a clandestine videotaping program. App.5a-6a.

In fining the coach and the team, the NFL Commissioner wrote: "[t]his episode represents a calculated and deliberate attempt to avoid longstanding rules designed to encourage fair play and promote honest competition on the playing field." App. 6a. The complaint alleges that the Patriots had been violating NFL rules since 2000. Strangely, instead of imposing a large penalty and a thorough investigation as required by NFL rules, the NFL destroyed the many tapes of the Patriots proving that they illegally stole opponents' signals. (The facts are further summarized at App. 2a-12a)

This case is about a massive, systematic organizational scheme to steal opponents' signals and cheat ticket-holders of a contest played according to NFL rules that they pay to witness. It was brought by a New York Jets season ticket holder who, like all Jets ticket-holders, paid several thousands dollars to purchase season tickets to watch the Jets. (Jets tickets, like tickets to watch most professional football teams, are not sold individually but in season ticket packages.)

The complaint alleges that the Patriots - who share revenue with the Jets even for games played in the Jets stadium – fraudulently induced a class of ticket holders to purchase tickets for what was advertised as a fair NFL contest.

Such pervasive cheating has consistently given the Patriots an unfair, illegal advantage over its opponents and systematically deprived plaintiffs of the right to witness football matches played fairly as advertised and according to NFL rules, which is what plaintiffs contracted for.

The complaint states that the Patriots began systematically stealing the signals of opponents, thereby giving them a decisive advantage and "destroying ...the games' underlying competitiveness." The complaint cites a Patriots quarterback who says that because of the illegal stealing of signals, "probably 75 percent of the time [our opponent] ran the defense we thought they were going to run." Legitimate competition is impossible in football when one team knows what the other will do 75% of the time and no fan, at least no rational fan, would knowingly pay the substantial sums demanded for tickets to NFL games to witness such a rigged spectacle.

The Third Circuit Court of Appeals stated bluntly that "We do not condone the conduct on the part of the Patriots and the team's head coach." App.28a

Nonetheless, the Patriots and the NFL argue, and the Third Circuit agreed, that fans have no recourse and no rights as consumers no matter what the teams and the league do. The NFL and the Patriots find it irrelevant that the fans/consumers pay the bills.

The NFL and the Patriots believe they are a self-regulating entity immune to the concerns of football fans/consumers, who are almost all season ticket holders, and who usually pay a minimum of $4,000 per year for a package of four season tickets. Add in parking, gas, tolls refreshments, souvenirs etc. and the American family of four is shelling out well over $5,000 per season to watch their favorite football team. These consumers do not pay up to ten percent of the median family income in America to watch games that are fixed, altered, adulterated or consistently played against the rules so that one team has a nearly insurmountable advantage over another.

Not content with an anti-trust exemption that Congress gave the NFL, not content with the NFL's status as a tax-exempt 501(c) 6 organization and not content with the myriad federal, state and local tax subsidies provided to professional football teams, the Patriots and the NFL contend that they are a self-regulating entity beyond the reach of law. If the ruling below stands, they will remain exempt from New Jersey common law and the fundamental laws of contract and fraud as well as federal racketeering laws.

The wholesale adoption of the Third Circuit of an ancient rule that says tickets are "licenses" not contracts is at odds with the development of professional football into not only the most popular sport in America but one of its biggest industries. The National Football League, in its 90th year, is a gigantic $6.3 billion annual business — the biggest in American sports.

According to the league's business model, all 32 teams share equally the bulk of the NFL's revenue, which comes from national TV contracts and licensing deals. Home teams must pay over 40 percent of general

ticket sales to their opponents on game day. There are not only enormous financial incentives to cheat, but to conceal their cheating, since the Patriots, under the NFL business model, garner 40% of the Jets home game ticket revenue.

What is remarkable about the behavior of the Patriots in this case was that the cheating scheme went on for so long, that it was universally condemned, and that the NFL did little to investigate its full extent.

The Patriots were caught videotaping the Jets signals during their game on September 9, 2007 in violation of NFL rules. On September 16, 2007, NFL Commissioner Roger Goodell ordered the Patriots to hand over all notes, tapes, and other materials related to the videotaping of a game incident. News outlets began running the actual illicit video from the Patriots game against the Jets. On September 20, 2007, the NFL announced it had received and destroyed the requested materials.

On February 1, 2008, U.S. Senator Arlen Specter (R-PA), the ranking member of the Senate Judiciary Committee, commented on the incident and the NFL's decision to destroy the videotape evidence in a New York Times article. Specter was quoted in a letter to Goodell as saying, "I am very concerned about the underlying facts on the taping, the reasons for the judgment on the limited penalties and, most of all, on the inexplicable destruction of the tapes."

In the days before Super Bowl XLII, Matt Walsh, a former Patriots employee who was with the team in 2000-2002 as a video assistant, indicated that he had information regarding the Patriots' actions but had not yet divulged it. Walsh sent eight separate videotapes to the league offices that showed the

Patriots taping opposing teams signals during different games in violation of NFL rules.

Meanwhile, Specter issued a statement in response to the NFL's downplaying of the new videotapes to surface: "I think it is very unfortunate that the NFL has already started its 'nothing new' spin before watching the tapes or finding out what Mr. Matt Walsh has to say. Let's see where the evidence leads."

Specter also revealed that the Patriots illicit video program dated back to 2000 and the "Spygate" case against the New England Patriots involved four games against the Pittsburgh Steelers, including two AFC championship games. Specter told the Pittsburgh Post-Gazette, "I think Steelers fans have a lot to be concerned about this and I'm one of them... maybe Steelers ownership should think about it a little." Specter also released a floor statement following a meeting with Walsh indicating that during the 2002 Patriots-Steelers AFC Championship Game Walsh turned his Patriots sweater inside-out to conceal his activities and secured a generic, not team, credential for the game.

Walsh's revelations about the systemic and pervasive nature of the Patriots cheating operation were stunning. Walsh confessed that he received his instructions about videotaping the other teams signals from head coach Belichick's own personal assistant, Ernie Adams, and that the program began in 2000. Walsh was further instructed by the Patriots organization to conceal his actions and misrepresent his activities if challenged on the field by: 1) intentionally breaking the red operating light on the video camera; 2) telling anyone questioning the use of a third video camera on the field that he was filming tight shots or highlights; and 3) if asked why he was not filming action

on the field (when he was in fact stealing opponents signals) he was to say he was filming the down marker. App. 8a.

The complaint in this action alleges in detail how fraud was built into the Patriots organization and that the instructions to Walsh to conceal his illicit activities "demonstrate a consciousness of wrongdoing by the Patriots' management and an intent and plan to keep the taping program secret from ticket-holders and competing teams."

The longstanding, pervasive and systemic nature of the Patriots' cheating operation makes clear that this case has nothing in common with scenarios postulated whereby fans might bring litigation because one team committed a holding violation or some other minor rule infraction. It is the wholesale violation of league rules and any sense of fairness making an honest contest impossible that sets this case apart.

After the Third Circuit ruled in this matter, in an astounding development demonstrating, again, that the NFL cannot self-regulate and has not stopped the ongoing systemic violations of its rules, another NFL team was found to be illegally videotaping opposing teams signals. Stunningly, some of the same personnel used by the Patriots in their illegal scheme were involved.

On November 27, 2010, the NFL fined the Denver Broncos and their head coach Josh McDaniels -- who served as an assistant coach under Belichick from 2001-2008 -- $50,000 each after Broncos video director Steve Scarnecchia videotaped the San Francisco 49ers' walkthrough practice prior to an October 30, 2010 NFL game.

Scarnecchia was a video assistant for the Patriots in 2001-2004 and was specifically implicated by

Walsh as having continued the Patriots unlawful video operation that Walsh was instructed by the Patriots organization to start. App. 8a. On December 6, 2010, McDaniels was fired by the Denver Broncos. This latest incident – now known as "Spygate II" -- only underscores the need to extend additional protections to fans and consumers given that the NFL is clearly unable to police itself and consistently provide games to fans played according to NFL rules as advertised and sold.

In contrast to the Third Circuit and the district court below, other courts in other circuits and jurisdictions have moved to extend common law and statutory protections to ticket-holders and fans. Courts have properly found that the laws of contract, fraud and consumer protection, among others, apply to them and that ticket holders as consumers have many rights under the law. If consumers want to pay to see entertainment that is fixed or rigged, they would spend their dollars on wrestling "entertainment" which has no governing body and no rules and is explicitly billed as "Worldwide Wrestling Entertainment", not legitimate sport.

A comprehensive and serious review of the rights of consumers and the functioning of the sports marketplace is long overdue. A grant of certiorari to review the burgeoning and conflicting case law governing fans' rights to see sporting events played according to uniform rules, as advertised and contracted for, is warranted.

REASONS FOR GRANTING THE PETITION

I. This Court Should Resolve The Conflict Between The Ruling of the Third Circuit (Followed By The Seventh Circuit) That Ticket-holders/Consumers Only Have a License and No Rights And Rulings By Lower Courts In Other Circuits Including the Sixth and Ninth Circuits Holding That Tickeholders/Consumers Indeed Have A Contract And A Full Panoply of Legal Remedies.

The opinion of the Third Circuit below was anchored principally on the theory that a ticket to a professional football game is merely a "license" and under common law said license is revocable and there are no contractual or any other rights attached to the purchase. App. 14a-15a. The Third Circuit relied on *Shubert v. Nixon Amusement Co.*, 83N.J.L. 101 (Sup.Ct.1912) which involved a gentleman who purchased tickets to the theatre and was removed by management even though he had a ticket and was seated, presumably because of his race. The Shubert opinion followed the Court of Exchequer's opinion in *Wood v. Leadbitter*, (1845) 153 Eng.Rep. 351, (Exch.) that a purchase of a ticket provides a patron with nothing more than a revocable license.

It is this ancient common law rule that also underpins the decision of the Seventh Circuit, relied on by the Court below, in *Bowers v. Federation Internationale de l'Automobile*, 489 F.3d 316 (7th Cir. 2007) App. 21a-23a.

In contrast to this rule, lower courts in other circuits have begun to recognize that the customers of professional sports in America have greater rights than those conferred by ancient common law. Undoubtedly persuaded by the evolution of professional sports and the complex and expensive season ticket contracts underpinning modern sports leagues, these courts have accorded contract rights and consumer protection statutory rights to ticket-holders/consumers.

In *Beder v. Cleveland Browns Inc*, 129 Ohio App. 3d 188; 717 N.E.2d 716 (Ohio Ct. App.,Cuyahoga County 1998), *appeal not allowed* 84 Ohio St. 3d 1438, 702 N.E.2d 1215 (1998), the Ohio Court of Appeals held that an action brought by a Cleveland Browns season ticket holder against the Browns for moving the team to Baltimore could proceed as a breach of contract action:

> "As the Eleventh Appellate District determined, we likewise find that the season ticket package, such as that purchased by appellants, constituted a contract because all the requisites of a contract were present. What remains to be decided is if there were genuine issues of fact regarding whether that contract was breached. As a threshold matter, because we find that an express contract exists between the Browns and appellants, appellants remedy is for breach of that contract..." Id. at 195.

Such decision is far more persuasive than the antiquated holding in *Shubert* but in any event this Court should grant the petition to resolve the conflict.

Having certified a class of season ticket holders and having ruled that plaintiffs' claims in contract, fraud and violation of the Ohio consumer protection act could proceed, the *Beder* case was settled when the Browns and the NFL agreed to pay several million dollars to provide a fund that would give each season ticket holder $50. See *Beder v. Cleveland Browns, Inc.* 114 Ohio Misc. 2d 26; 758 N.E.2d 307 (Ct. of Common Pleas, Cuyahoga County, 2001).

Similarly, a federal court in the Ninth Circuit holds that ticket-holders/consumers enjoy the protections of consumer protection laws. In *Brotherson v. Prof. Basketball Club, L.L.C.*, 604 F.Supp.2d 1276 (W.D.Wash.2009) the court considered whether the season ticket-holders for a professional basketball team could make out a claim under the consumer protection statute of Washington state. The District Court ruled that the consumer fraud statute applied. (On a motion for summary judgment, however, the Court found that plaintiffs had not offered evidence that the value of their tickets declined.) As the federal District Court judge put it: "if a reasonable consumer understood that he or she was buying nothing other than the right to be subject to the unfettered whim of [the defendant]," then no one would have entered into a season ticket contract. *Brotherson v. Prof. Basketball Club, L.L.C.*, 604 F.Supp.2d 1276 (W.D.Wash.2009).

Also in the Sixth Circuit, in *Skalbania v. Simmons*,443 N.E.2d 352 (Ind. App. 1982) a court certified a class action on behalf of season ticket holders who sued the Indianapolis Racers professional hockey team when the team ceased operations after only 13 of 40 home games had been played. Plaintiffs' claims for breach of contract, common law fraud, tortious interference with contractual relations were allowed to proceed despite the identical arguments raised here that the ticket holders held only a "license" with no contractual rights.

Even within the Third Circuit there is important authority for the proposition that ticket-holders have much more than a revocable license. In *Oshinsky v. New York Football Giants Inc.*, 2009 WL 4120237 (Slip. Op. Nov. 17, 2009 D.N.J. 2009) a season ticket-holder of both the Jets and Giants football teams sued both organizations for instituting Personal Seat Licenses (PSLs) that interfered with the contractual rights of season ticket-holders. The court upheld the plaintiff's contract claim on a motion to dismiss, ruling that season ticket-holders have more than a mere license to attend each game. The court held that season ticket-holders also have an option contract to renew their season tickets. In so holding, the court ruled that this contractual right may have been breached and ordered discovery on that very issue.

Exactly as in this case, the defendant football organization put forward the same rote argument that the NFL and its teams offer in the many litigations with its consumers/season ticket-holders: "the purchase of a ticket creates nothing more than a revocable license." *Oshinsky* at 6. (internal citations to defendants brief omitted.)

The *Oshinsky* court, as many others are now doing, rejected this reasoning, holding: ('[T]he conclusion does not follow that, because each single ticket is a revocable license, [the team] can either deny [a season ticket-holder's] request to transfer his season ticket-holder status or refuse to recognize that status in his transferees.') Id.

The *Oshinsky* doctrine is that season ticket-holders actually purchase a bundle of contractual rights. One is an option to renew and another is a contractual right to renew.

If in *Oshinsky*, imposing a PSL fee can be seen as interfering with season ticket-holders contractual rights, in the case at bar, claims for tortious interference with contractual relations can also be made out.

Oshinksy is part of an emerging body of law that protects season ticket-holders in their dealings with billion dollar sports teams. As the *Charpentier* court trenchantly observed: "[i]t is common knowledge that professional sports franchisees have a sordid history of arrogant disdain for the consumers of the product." *Charpentier v. Los Angeles Rams Football Company, Inc.*, 75 Cal.App.4th at 311 314, 89 Cal.Rptr.2d 115 (Cal. Ct. of Appls. 4th Dist. 1999). Fortunately, *Charpentier* and other courts have begun to address this inequity.

As *Oshinsky* points out, the Jets do not even sell individual tickets; they only sell season ticket packages. *Oshinsky* at p.1. ('[T]he waiting list for Giants and Jets season tickets is currently over 150,000 and 13,500 people, respectively. For this reason, the Giants and Jets do not sell tickets to individual games. Instead, all tickets are purchased by season ticket-holders.)

II. The Supreme Court Should Review Whether The Third Circuit Has Impermissibly Intruded on State's Rights By Deciding Substantive Issues of State Law Relating To Contract and Consumer Protection Before State Supreme Court's Have Decided These Matters.

This Court should grant the petition as well to review whether the Third Circuit intruded impermissibly on state's rights by deciding what the New Jersey Supreme Court *would* hold rather than relying on an actual holding of that Court.

The Third Circuit below ruled that: "We believe that the New Jersey Supreme Court would follow the reasoning adopted by both the District Court as well as by the overwhelming weight of the case law." App. 24a.

This statement, however, is in tension with the Third Circuit's repeated statements in its opinion below that this case is "unique" and has never before been presented.

Furthermore, there is substantial evidence that the New Jersey Supreme Court in fact has moved away from the ancient common law doctrine of *Leadbitter* and *Shubert*. Both holdings were specifically disapproved by the New Jersey Supreme Court in *Uston v. Resorts International Hotel Inc.*, 89 N.J. 163; 445 A.2d 370 (1982). The New Jersey Supreme Court has a very expansive view of contract law, often holding that consumers are either protected because contracts are considered contracts of adhesion or that consumers are protected under the New Jersey Consumer Fraud Act (CFA) which would apply whether or not a ticket to a football game is considered a license.

Under the New Jersey Consumer Fraud Act, "merchandise" includes any goods offered to the public for sale. N.J.S.A. 56:8-1. See *Real v. Radir Wheels, Inc.* 198 N.J. 511; 969 A.2d 1069 (S.Ct. 2009). The closest New Jersey case on point is *Smerling v. Harrah's, 389 N.J. Super.* 181; 912 A.2d 168 (Sup. Ct. App. Div. 2006) holding that an action under the CFA should go forward when a plaintiff/consumer was given a coupon, or "ticket" as it was called by the casino, to participate in a contest at Harrah's casino.

At a minimum, this Court should grant the petition to determine if this matter should be remanded to the Court below with instructions to have the issue in question certified to the New Jersey Supreme Court.

III. The Supreme Court Should Revisit It's Opinion *In Marrone v. Wash. Jockey Club of D.C., 227 U.S. 633 (1913)* Holding That Spectators At Sporting Events Have No Contractual Rights And Only Purchase A License to Sporting Events. This Outmoded Common Law Doctrine Is Not Applicable To America's Most Popular Professional Sport, the NFL, Which Has Become a $6.3 Billion Industry With Millions of Consumers.

The Third Circuit partially based its holding on the proposition that the United States Supreme Court adopted the ancient legal precept that tickets to sporting events only confer a revocable license. App. at 15a. "[T]he United States Supreme Court, in a decision written by Justice Holmes considering the exclusion from a racetrack of a ticket-holder suspected of drugging a horse, cited with approval both *Leadbitter* and *Shubert*." App. at 15a. The doctrine of *Marrone* has not been revisited by the Supreme Court since 1913.

This Court should grant the petition to review whether the outmoded precedent of *Marrone* should be updated to reflect the current realities of season ticket-holders in multi-billion dollar modern professional sports leagues. Not only are virtually all tickets to professional events sold as multi-thousand dollar season ticket packages, but many are now sold with all sorts of complex packages like parking passes and "personal seat licenses" which are in fact contracts that run to dozens of pages. The nineteenth century doctrine of revocable licenses might be applicable to one-time admissions to race tracks and theatres, but it is simply inadequate to deal with modern professional sports leagues.

IV. The Supreme Court Should Review Whether The Holding of The Third Circuit Conflicts With *American Needle, Inc. v. National Football League, et al.*, 560 U.S. ___ (2010).

On May 24, 2010, this Court decided *American Needle, Inc. v. National Football League, et al.*, 560 U.S. ___ (2010). In *American Needle*, a corporation that designed, manufactured, and sold headwear carrying trademarked names and logos of various professional football teams sued the NFL, its 32 member teams, and the owners of those teams on antitrust grounds. In reversing the opinion of the Seventh Circuit, this Court affirmed that the NFL is not "above the law" in that its purportedly self-governing nature did not exempt it from applicable antitrust laws.

By extension, the United States Supreme Court should grant review to determine if the NFL is exempt from applicable state consumer fraud laws as well as state and federal RICO laws. In particular, although consumer fraud was pled and preserved on appeal, the Third Circuit did not address in its opinion any of the New Jersey consumer fraud claims.

The Court, referencing the opinion of the Court of Appeals for the Seventh Circuit, noted that "football itself can only be carried out jointly. 'Asserting that a single football team could produce a football game... is a Zen riddle: Who wins when a football team plays itself?" *American Needle* at 2208. As described above, Spygate answers the riddle. By rigging the game in the manner they did, the Patriots, a single football team, could not produce a football game. Instead, they played themselves. Thus, Spygate answers the Zen riddle. When a football team plays itself, the consumer-fans lose in that they do not see a football game. Using the same language, Mayer and the class he purports to represent did not see a legitimate football game.

Because Mayer did not see a legitimate football game played according to NFL rules, this Court ought to review the conclusion of the Third Circuit that, "Mayer undeniably saw *football* games..." (emphasis in original). App. 25a. Likewise, the District Court erred when it ruled because it, too, based its opinion on the false belief that, "... (Mayer) was able to view a ***football game***" (emphasis added). App. 34a-35a.

V. The Supreme Court Should Grant Review Because of The National Importance of the Novel and Unprecedented Issues Raised Which Affect Millions of Consumers Who Patronize America's Most Popular Professional Sport.

This court should grant review because this case implicates an issue of national importance affecting millions of consumers who patronize America's most popular professional sport.

After granting a highly unusual hour-long oral argument in this matter, the Third Circuit Court of Appeals stressed repeatedly in its opinion that this case is novel and unprecedented:

- "This highly unusual case..." App. 2a.
- "Although the factual circumstances and claims before this Court appear to be rather unique..." App. 20a.
- "... unusual and even unique circumstances presented by this appeal." App. 14a.
- "It does appear that the ***various (and numerous) decisions cited by the District Court and the parties on appeal are distinguishable*** from the highly unusual (and even unique) circumstances present here. **Simply put, no one in the past has ever brought a legal action quite like this one**." App. 14a.

In other words, the Circuit court found that ***all*** the decisions cited by the District Court and by the parties on appeal could be distinguished from Mayer's case. App. 14a.

The United States Supreme Court should grant the petition precisely because this case is *sui generis* and at the same time implicates issues of national importance to millions of Americans

Spygate does not, as defendants would have it, concern an in-game penalty or rule infraction such as holding, roughing the passer, unsportsmanlike conduct, or the like. Rather, it concerns the integrity of the Patriots, Belichick, the NFL, and the game of football itself. Nor does this case involve a fan's disappointment in his expectations such as the situation in *Bowers* where Formula One racing fans were disappointed to see a race with fewer cars than expected or the situation in *Castillo* where fans were disappointed when Mike Tyson was disqualified for biting his opponent's ear. Moreover, Spygate does not concern an "off-field infraction" such as an athlete's failure of a drug test. That situation goes to the integrity of the individual player but not the sport itself.

Professional sports, including professional football, are about fair competition. When one side cheats or otherwise prevents that fair competition, the very reason for professional sports is lost. Ultimately, it is the fans, including Mayer, who are cheated when not allowed to see fair competition. Mayer and his purported class buy tickets to see who prevails under the agreed rules of fair play. Were this not the case, Mayer and the purported class would be better served spending their money on non-competitive forms of spectator entertainment, such as theater, music concerts, or movies.

There is an extraordinary public interest in a clear and immediate resolution of the question presented by Mayer's petition.

Spygate, while unprecedented in the history of professional football, may be likened to major league baseball's infamous "Black Sox Scandal" in which the 1919 World Series was rigged and the integrity of baseball was tainted for many years.

In the Black Sox Scandal, eight members of the Chicago White Sox were banned for life from baseball for throwing (i.e., intentionally losing) games, and essentially giving the series to the Cincinnati Reds.

The legal system was not content, however, to let professional baseball regulate itself, and neither should the courts be content to let the NFL "regulate" itself when the very integrity of the game is at stake. The prosecution of the Black Sox scandal sounded in fraud. In September 1920, a grand jury was convened to investigate. Player John F. "Shano" Collins was named as the wronged party in the indictments of the key figures in the Black Sox scandal. The indictment claims that by throwing the World Series the alleged conspirators defrauded him of $1,784.

Despite the fact that the NFL levied fines against Belichick and the Patriots, teams are still undeterred from cheating and rigging games in the way Belichick and the Patriots did. This was starkly revealed only days ago when the Denver Broncos Coach McDaniels, a former assistant coach to Belichick, apparently learned that he would not be punished by the legal system for illegally videotaping his opponents. Similarly, Steve Scarnecchia, the individual who illegally videotaped the 49ers' for McDaniels, was in the employ of the Patriots and Belichick from 2001-2004 and apparently learned the same lesson McDaniels did. What is now known as "Spygate II" is a stark reminder that legal review is needed when the integrity of the game itself is questioned.

This is the Court of last resort and this petition for a writ of certiorari constitutes the last chance for something to be done by the United States Government to protect the integrity of professional football.

VI. The Supreme Court Should Review Whether The Federal RICO Statute Protects Consumers Who Observe Rigged And Fraudulent Professional Sporting Events.

Plaintiff specifically pled and preserved on appeal a federal and state RICO claim. App. 10a-11a. Nonetheless, neither the District Court nor the Third Circuit Court of Appeals ruled on these claims and therefore the federal and state RICO causes of action are ripe for review by this Court. Also ripe for review are the remaining additional counts pled and preserved on appeal but not ruled on by either the District Court or Third Circuit including, *inter alia*, fraud, tortious interference with contractual relations, unjust enrichment, quasi-contract, violations of the New Jersey Consumer Fraud Act and infringement of third party rights. App. 10a-11a.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,
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No. 09-2237

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CARL J. MAYER,
Appellant

v.

BILL BELICHICK; THE NEW ENGLAND PATRIOTS; NATIONAL FOOTBALL LEAGUE

April 14, 2010, Argued

May 19, 2010, Filed

On Appeal from the United States District Court for the District of New Jersey. (D.C. Civil No. 3-07-cr-04671).

COUNSEL: Bruce I. Afran, Esq. (Argued), Princeton, NJ; Carl J. Mayer, Esq. (Argued), Mayer Law Group, Princeton, NJ, Counsel for Appellant.

Daniel L. Goldberg, Esq. (Argued), Charles L. Solomont, Esq., Bingham McCutchen, Boston, MA; David Kistler, Esq., Stephen M. Orlofsky, Esq., Blank Rome, Princeton, NJ, Counsel for Appellees Bill Belichick and New England Patriot Football Club.

Paul M. Eckles, Esq., Shepard Goldfein, Esq. (Argued), Skadden, Arps, Slate, Meagher & Flom, New York, NY, Counsel for Appellee National Football League.

BEFORE: FISHER, and COWEN, Circuit Judges and PRATTER *, District Judge.

OPINION

COWEN, Circuit Judge

Plaintiff Carl J. Mayer appeals from the order of the United States District Court for the District of New Jersey granting the respective motions to dismiss filed by Defendants Bill Belichick and the New England Patriots ("Patriots") as well as by Defendant National Football League ("NFL"). We will affirm.

I.

This highly unusual case was filed by a disappointed football fan and season ticket-holder in response to the so-called "Spygate" scandal. This scandal arose when it was discovered that the Patriots were surreptitiously videotaping the signals of their opponents.

Mayer, a New Jersey resident and New York Jets season ticket-holder, initially filed his complaint on September 7, 2007. He named as Defendants the Patriots, headquartered in Massachusetts, as well as the team's head coach, Belichick, a Massachusetts resident. Mayer eventually filed an amended complaint on August 19, 2008, which added the NFL, with its headquarters in New York, as a Defendant.

We, like the District Court before us, must look to the amended complaint, accepting its well-pleaded factual allegations as true for purposes of this appeal. The "Preliminary Statement of the Case" section of this extensive pleading provided a fair description of the gist of Mayer's case, at least against the Patriots and Belichick:

2. This case is brought by a New York Jets season ticket-holder on behalf of all similarly situated New York Jets season ticket-holders and other New York Jets ticket-holders against the Defendant New England Patriots and their coach, Defendant Bill Belichick. The core of this action is that the Defendants, during a game with the New York Jets on September 9, 2007, instructed an agent of the Defendants to surreptitiously videotape the New York Jets coaches and players on the field with the purpose of illegally recording, capturing and stealing the New York Jets signals and visual coaching instructions. The Defendants were in fact subsequently found by the National Football League ("NFL") to have improperly engaged in such conduct. This violated the contractual expectations and rights of New York Jets ticket-holders who fully anticipated and contracted for a ticket to observe an honest match played in compliance with all laws, regulations and NFL rules.

3. Plaintiffs contend that in purchasing tickets to watch the New York Jets that, as a matter of contract, the tickets imply that each game will be played in accordance with NFL rules and regulations as well as all applicable federal and state laws. Plaintiffs contend that Defendants tortuously [sic] interfered with their contractual relations with the New York Jets in purchasing the tickets. They further claim that Defendants violated the New Jersey Consumer Fraud Act and the New Jersey Deceptive Business Practices Act. Plaintiffs also claim that the

> Defendants violated federal and state racketeering laws by using the National Football League as an enterprise to carry out their illegal scheme. Because the Defendants have been found in other games to have illegally used video equipment, this action seeks damages for New York Jets ticket-holders for all games played in Giants stadium between the New York Jets and the New England Patriots since Bill Belichick became head coach in 2000.(A18-A19.) Mayer then described at some length the alleged misconduct at issue here. His account, in turn, relied heavily on press accounts of the Spygate scandal as well as "on information and belief" allegations.

At their most fundamental level, the various claims alleged here arose out of the repeated and surreptitious violations of a specific NFL rule. This rule provides that "'no video recording devices of any kind are permitted to be in use in the coaches' booth, on the field, or in the locker room during the game'" and that "all video for coaching purposes must be shot from locations 'enclosed on all sides with a roof overhead.'" (A22.) In a September 6, 2007 memorandum, Ray Anderson, the NFL's executive vice president of football operations, stated that "'[v]ideotaping of any type, including but not limited to taping of an opponent's offensive or defensive signals, is prohibited on the sidelines, in the coaches' booth, in the locker room, or at any other locations accessible to club staff members during the game.'" (*Id.*)

On September 9, 2007, the Jets and the Patriots played the season opener in Giants Stadium, East Rutherford,

New Jersey. Mayer possessed tickets and parking passes to this game, and the Patriots ultimately won, 38-14. ESPN.com then reported that the NFL was investigating accusations that an employee of the Patriots was actually videotaping the signals given by Jets coaches at this game. Specifically, NFL security reportedly confiscated a video camera and videotape from an employee during the course of the game, and this employee was accused of aiming his camera at the Jets' defensive coaches while they were sending signals out to the team's players on the field.

This was not the first time a public accusation of cheating or dishonesty had been made against the Patriots. A man wearing a Patriots credential was found carrying a video camera on the sidelines at the home field of the Green Bay Packers in November 2006. Admittedly, "[t]eams are allowed to have a limited number of their own videographers on the sideline during the game, but they must have a credential that authorizes them to shoot video, and wear a yellow vest." (A21.) However, this particular individual evidently lacked the proper credential and attire and was accordingly escorted out of the stadium by Packers security.

With respect to the 2007 incident, the Patriots denied that there was any violation of the NFL's rules. A Patriots cornerback named Ellis Hobbs told the press that he was unwilling to believe that his team had cheated and that he was standing by the team and its coaches. However, he also admitted that, "[i]f it's true, obviously, we're in the wrong." (*Id.*) Belichick apologized to everyone affected following the confiscation of the videotape. But, at a weekly press

conference on September 12, 2007, he refused to take questions from reporters about the NFL investigation and stormed out of the room.

On September 13, 2007, "the NFL found the Defendants guilty of violating all applicable NFL rules by engaging in a surreptitious videotaping program." (A22.) It imposed the following sanctions: (1) the Patriots were fined $ 250,000.00; (2) Belichick was personally fined $ 500,000.00; and (3) the Patriots would be stripped of any first-round draft pick for the next year if the team reached the playoffs in the 2007-2008 season and, if not so successful, the team would otherwise lose its second- and third-round picks. Roger Goodell, the commissioner of the NFL, characterized the whole episode as "'a calculated and deliberate attempt to avoid longstanding rules designed to encourage fair play and promote honest competition on the playing field.'" (*Id.*) He further justified the penalties imposed on the team on the grounds that "'Coach Belichick not only serves as the head coach but also has substantial control over all aspects of New England's football operations" and therefore "'his actions and decisions are properly attributed to the club.'" (*Id.*)

The owner of the Patriots, Robert Kraft, refused to comment on the NFL's sanctions, and the New York Jets issued a statement supporting the commissioner and his findings. On September 13, 2007, Belichick stated the following: "'Once again, I apologize to the Kraft family and every person directly or indirectly associated with the New England Patriots for the embarrassment, distraction and penalty my mistake caused. I also apologize to Patriots fans and would like

to thank them for their support during the past few days and throughout my career.'" (A23.) However, he then "bizarrely . . . attempted to deny responsibility, stating: 'We have never used sideline video to obtain a competitive advantage while the game was in progress. . .[.] With tonight's resolution, I will not be offering any further comments on this matter. We are moving on with our preparations for Sunday's game.'" (*Id.*) But, at least according to Mayer, Jets ticket-holders have refused to "move on." (*Id.*)

The Patriots and Belichick deployed their surreptitious videotaping program during all eight games played against the Jets in Giants Stadium from 2000 through 2007. Beginning in 2000 when Belichick became head coach, they commenced an ongoing scheme to acquire the signals of their adversaries and then match such signals to the plays on the field, in alleged violation of the "NFL rules that are part of the ticketholders' contractual and/or quasi contractual rights." (A24.) On the other hand, Jets fans collectively spent more than $ 61 million on tickets to watch these purportedly honest and competitive games between the two teams.

In 2000, Matt Walsh, an employee in the team's videography department, was hired by the team to videotape the signals of opponents. Relying specifically on statements made by Walsh to the New York Times and United States Senator Arlen Specter, Mayer made a series of allegations with respect to this Patriots employee. Walsh claimed that he received his videotaping instructions directly from Ernie Adams, Belichick's own special assistant. The purpose of the videotaping program was to capture signals for use in games against the same opponent later in the season,

and the program was later expanded to include teams that the Patriots could encounter in the playoffs. The first instance of taping occurred in a 2000 pre-season game against the Tampa Bay Buccaneers. When the two teams played again in the regular season opener, the Patriots appeared to use the acquired signals. Walsh specifically asserted "that this was the first time he had seen quarterback Drew Bledsoe operate a 'no huddle' [offense] 'when not in a two-minute or hurry situation'" and that, when he asked an unnamed quarterback if the taped signals were helpful, the player replied that, "'probably 75 per cent of the time, Tampa Bay ran the defense we thought they were going to run.'" (A24-A25.) Although Walsh left the videotaping program after the 2002 Super Bowl, "he [as a Patriots season ticket-holder] witnessed Patriots employee Steve Scarnecchia continue the same taping practices in multiple games in the 2003, 2004, and 2005 seasons." (A25.) Walsh was further instructed by the Patriots organization to conceal his actions and misrepresent his activities if challenged on the field by: (1) intentionally breaking the red operating light on the video camera, (2) telling any person questioning "the use of a third video camera on the field" that he was filming tight shots or highlights, and (3) "if asked why he was not filming action on the field, he was to say he was filming the down marker." (*Id.*) Finally, at the 2002 American Football Conference championship game against the Pittsburgh Steelers, Walsh was instructed not to wear a team logo while filming.

Walsh's attorney, Michael Levy, likewise released a statement describing the team's method "of securing and tying coaching signals to plays." (A26.) As reported in the New York Post, the lawyer provided the

following description of a videotape made during an October 7, 2001 game against the Miami Dolphins:

> "[It] contains shots of Miami's offensive coaches signaling Miami's offensive players, followed by a shot from the end-zone camera of Miami's offensive play, followed by a shot of Miami's offensive coaches signaling Miami's offensive players for the next play, then edited to be followed by a shot of the subsequent Miami offensive play," Levy told ESPN.com. "And that pattern repeats throughout the entire tape, with occasional cuts to the scoreboard.'"

(*Id.* (citation omitted).)

> Citing again to the New York Post, Mayer further alleged that the NFL wrongfully destroyed the illicit videotapes themselves:
>
> Other tapes produced to the NFL (and later destroyed by order of Commissioner Roger Goodell, *see infra*) include defensive signals from Miami coaches in a game on Sept. 24, 2000, signals from Bills coaches from a Nov. 11, 2001 game, signals from Browns coaches from a game on Dec. 9, 2001, two tapes of signals from Steelers coaches from the 2001 AFC Championship game on Jan. 27, 2002, and signals from Chargers coaches from a game Sept. 29, 2002.

(*Id.* (citation omitted).) Walsh provided at least eight videotapes to the NFL, while the Patriots likewise furnished at least six tapes to the league. The

commissioner claimed that he ordered the destruction of the videotapes to prevent their use by the Patriots, even though the NFL allegedly had a legal duty to preserve these items pursuant, inter alia, to the Sarbanes-Oxley Act and the NFL's own antitrust exemption.

Mayer then made various class action allegations in his amended complaint. According to the pleading, he intended to seek the certification of both a national class and a state sub-class. The proposed national class would consist of "[a]ll New York Jets season ticket-holders and other ticket-holders who purchased tickets to games between the New York Jets and the New England Patriots in Giants stadium since Bill Belichick became the head coach of the New England Patriots in 2000." (A27.) The subclass would encompass "[a]ll individuals that are residents of the State of New Jersey and that purchased tickets to watch the New York Jets play the New England Patriots between 2000 and 2007 in Giants stadium." (*Id.*) The officers, directors, employees, legal representatives, successors, and assigns of Defendants were expressly excluded from both proposed classes. Mayer additionally advanced various allegations with respect to the specific class action requirements of numerosity, typicality, adequacy, and predominance and superiority.

Mayer ultimately alleged nine separate counts in his amended complaint. He asserted, in order, the following causes of action against the Patriots and Belichick: (1) tortious interference with contractual relations; (2) common law fraud; (3) violations of the New Jersey Deceptive Business Practices Act; (4) violations of New

Jersey's racketeering statute; (5) violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"); (6) the infringement of the rights of ticket-holders as third-party beneficiaries; (7) breach of implied contract or quasi-contract; and (8) violations of the New Jersey Consumer Fraud Act ("NJCFA"). Finally, he advanced a breach of contract claim against the NFL on account of its destruction of the videotapes.

Mayer sought an extensive range of relief in his amended complaint, asking for: (1) a declaratory judgment; (2) equitable relief in the form of a preliminary and permanent injunction prohibiting any videotaping in violation of NFL rules and both state and federal law; (3) the award of statutory damages in the form of (a) "actual damages sustained by the customers in the amount of [$ 61,600,000.00] for the amount paid by New York Jets ticket-holders to watch eight fraudulent games between the New England Patriots and the New York Jets between 2000 and 2007" as well as (b) "treble damages pursuant to [RICO and the NJCFA] for a total amount of compensatory damages of $ 184,800,000.00;" (4) the award of punitive damages; (5) the award of attorneys' fees and other costs; and (6) the award of restitution, disgorgement, and all other relief allowed under the NJCFA as to the New Jersey sub-class. (A42.) Mayer further expressly asked for a jury trial.

After they were served with the amended complaint, the Patriots and Belichick filed a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). The NFL subsequently filed its own motion to dismiss as well. The Patriots and Belichick included with their motion a copy of a Jets

ticket stub from an August 17, 2007 game against the Minnesota Vikings. This stub stated, inter alia, that "[t]his ticket only grants entry into the stadium and a spectator seat for the specified NFL game." (SA4.) It added that "[a]dmission may be refused or ticket holder ejected in the sole discretion of the New York Jets LLC or New Jersey Sports & Exposition Authority, subject to refund (or without refund if the ticket holder is disorderly or fails to comply with these ticket terms or any security measures)." (*Id.*) The District Court also received a brief from the Jets as amicus curiae, supporting the respective motions to dismiss. The District Court ultimately granted the motions to dismiss in an order entered on March 23, 2009, providing its reasons for doing so in an accompanying memorandum opinion. It specifically explained that the various causes of action must be dismissed as a matter of law because Mayer failed to allege any actionable injury.

III.

It is undisputed that the District Court possessed federal question, diversity, and supplemental jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1332, and 1367. This Court likewise has appellate jurisdiction under 28 U.S.C. § 1291.

We exercise de novo review of a District Court's dismissal under Rule 12(b)(6) for a failure to state a claim upon which relief may be granted. *See, e.g.*, *Phillips v. County of Allegheny*, 515 F.3d 224, 230 (3d Cir. 2008). We must accept all factual allegations in the complaint as true, construe the complaint in the light favorable to the plaintiff, and ultimately determine

whether plaintiff may be entitled to relief under any reasonable reading of the complaint. *See, e.g., id.* at 233. In order to withstand a motion to dismiss, "a complaint's '[f]actual allegations must be enough to raise a right to relief above the speculative level.'" *Id.* at 232 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 & n.3 (2007)). This "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citation omitted). On the contrary, a court is not required to accept legal conclusions alleged in the complaint. *See, e.g., Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993). The pleading must contain sufficient factual allegations so as to state a facially plausible claim for relief. *See, e.g., Gelman v. State Farm Mut. Auto. Ins. Co.*, 583 F.3d 187, 190 (3d Cir. 2009). A claim possesses such plausibility "'when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* at 190 (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)). In deciding a Rule 12(b)(6) motion, a court must consider only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents. *See, e.g., Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993).

IV.

The District Court, while noting that Mayer alleged numerous theories of liability in this case, appropriately turned to the following dispositive question: namely,

whether or not he stated an actionable injury (or, in other words, a legally protected right or interest) arising out of the alleged "dishonest" videotaping program undertaken by the Patriots and the NFL team's head coach. It does appear that the various (and numerous) decisions cited by the District Court and the parties on appeal are distinguishable from the highly unusual (and even unique) circumstances present here. Simply put, no one in the past has ever brought a legal action quite like this one. However, past cases do, at the very least, provide this Court with certain general legal principles especially relevant to the present matter. Taking into account these principles, the numerous arguments of the parties on appeal, the record on appeal, and the District Court's own ruling, we ultimately conclude that the District Court was correct to hold that Mayer failed to set forth a legally cognizable right, interest, or injury here. At best, he possessed nothing more than a contractual right to a seat from which to watch an NFL game between the Jets and the Patriots, and this right was clearly honored. More specifically, we predict that the New Jersey Supreme Court would reach the exact same legal conclusion if it were confronted with this appeal. *See, e.g., Holmes v. Kimco Realty Corp.*, 598 F.3d 115, 118 (3d Cir. 2010).

Initially, we consider how tickets to sporting and other entertainment events have been treated in the past. As the District Court recognized, New Jersey has generally followed a so-called "license" approach.[1] In *Shubert v. Nixon Amusement Co.*, 83 N.J.L. 101, 83 A. 369 (N.J. Sup. Ct. 1912), the old New Jersey Supreme Court considered a tort action filed by a plaintiff who, together with his friends, was ejected from a theater

even though they had already taken their seats,[2] *id.* at 369. In considering this action, the court turned to prior case law, especially the Court of Exchequer's leading decision in *Wood v. Leadbitter*, (1845) 153 Eng. Rep. 351 (Exch.). Relying, *inter alia*, on this English decision, the *Shubert* court repeatedly indicated that a ticket provides a patron with nothing more than a revocable license. *Shubert*, 83 A. at 369-71. For instance, it quoted, with approval, the Pennsylvania Supreme Court's finding "that 'a theater ticket is to be regarded as a mere license, for the revocation of which before the holder has actually been given his seat, and has taken it, the only remedy is in assumpsit for a breach of contract.'" *Id.* at 370 (quoting *Horney v. Nixon*, 213 Pa. 20, 61 A. 1088, 1090 (Pa. 1905)). While referring in passing to the "natural justice or injustice" of the defendant's actions, the New Jersey Supreme Court ultimately ruled that the well-established "license" rule barred the plaintiff's tort action even though he had already taken his seat in the theater before being asked to leave. *Id.* at 371.

It appears that this "license" approach has, for some time, been followed throughout the United States and in other common law jurisdictions throughout the world. For example, the United States Supreme Court, in a decision written by Justice Holmes considering the exclusion from a race track of a ticket-holder suspected of drugging a horse, cited with approval both *Leadbitter* as well as *Shubert* itself. *Marrone v. Wash. Jockey Club of D.C.*, 227 U.S. 633, 635, 33 S. Ct. 401, 57 L. Ed. 679 (1913). In turn, the current New Jersey Supreme Court adopted the "license" rule in another case dealing with the exclusion and expulsion of a ticket-holding patron from a race track. In *Garifine v. Monmouth Park*

Jockey Club, 29 N.J. 47, 148 A.2d 1 (N.J. 1959), the race track excluded and expelled a patron, who had been charged but acquitted of being a bookmaker, as an undesirable, *id.* at 2. The plaintiff argued, inter alia, "that notwithstanding the holding of the former Supreme Court in [*Shubert*], the operator of a licensed race track should not have the common-law right to exclude or expel a patron without reasonable cause." *Id.* After a thorough discussion, including summaries of both *Leadbitter* and *Shubert*, New Jersey's highest court rejected this attack on the "common-law right of race track operators to exclude suspected undesirables." *Id.* at 6. It noted, inter alia, that the plaintiff's complaint "does not question the defendant's good faith or sound purposes nor does it present any countervailing circumstances or any urgent considerations of justice or policy" indicating the need to depart from the general rule. *Id.*

Although it did not use the specific term "license," the ticket stub provided by the Patriots nevertheless appears consistent with this traditional approach. For example, it unambiguously stated that "[t]his ticket only grants entry into the stadium and a spectator seat for the specified NFL game." (SA4.) The stub further made clear that the Jets and the owners of the stadium retain sole discretion to refuse admission or to eject a ticket-holder. Admittedly, the *Shubert* court in particular made repeated references to the existence of a claim for breach of contract. *See Shubert*, 83 A. at 369-71. However, it appears that the court was only referring to the patron's right to obtain a refund of the ticket price (and related expenses) because the venue exercised its right to deny entry or expel the patron.[3] Given that Mayer was never barred or expelled from

any game at Giants Stadium, much more is needed to establish a cognizable right, interest, or injury than these kinds of inapposite statements.

On the other hand, it is also true that the whole traditional approach, generally permitting patrons to be excluded or expelled without cause, has been subjected to rather serious attack. Even as early as 1959, the *Garifine* court acknowledged some of this criticism, noting, *inter alia*, that the Court of Appeal of England and Wales actually rejected the prior holding in *Leadbitter*. *Garifine*, 148 A.2d at 3 (citing *Hurst v. Picture Theatres*, [1915] 1 K.B. 1 (A.C. 1914)). More recently, the New Jersey Supreme Court vigorously attacked the whole notion of an unfettered right to exclude or expel in a case involving a casino's decision to exclude a patron from its blackjack tables because of his card counting strategy. In *Uston v. Resorts Int'l Hotel, Inc.*, 89 N.J. 163, 445 A.2d 370 (N.J. 1982), the court ultimately held that the state's gaming statute gives the Casino Control Commission exclusive authority to set the rules and methods of licensed casino games and that the casino was thereby statutorily precluded from excluding the gambler. *Id.* at 371. However, the *Uston* court then attacked at some length the "current majority American rule" that an amusement place owner has "an absolute right arbitrarily to eject or exclude any person consistent with state and federal civil rights laws." *Id.* at 374 (citation omitted). For a variety of reasons (including speculation that the rule was developed and maintained as a way to protect segregationist activities), the court adamantly rejected the majority rule in favor of an approach recognizing the patron's right to "reasonable access." *Id.* at 373-75.

The status of the "license" rule in New Jersey with respect to the right of an amusement place owner to bar or exclude a patron still appears unsettled. In yet another race track case, the New Jersey Supreme Court expressly characterized the discussion in *Uston* regarding the rule as dicta. *Marzocca v. Ferone*, 93 N.J. 509, 461 A.2d 1133, 1137 (N.J. 1983). In *Marzocca*, the court concluded that this dicta did not apply to the exclusion of a horse owner and his horse from the track's races, and it therefore refrained from deciding whether the casino decision overruled *Garifine* sub silentio. *Id.* at 1134, 1137. On the other hand, the *Marzocca* court did further "limit the common law doctrine by proscribing exclusions that violate public policy." *Id.* at 1137. After noting that the plaintiff disclaimed the existence of any express or implied contract with the race track, the New Jersey Supreme Court ultimately found that no such public policy concerns were implicated. *Id.* at 1137-38.

We nevertheless conclude that neither the *Uston* ruling nor similar decisions have any real relevance here. As already noted, we are not concerned in this case with a patron excluded or ejected from the premises. In fact, it was the notion of a person's right to "reasonable access" that served as the fundamental basis for the reasoning of the court in *Uston*. We therefore need not (and do not) have to predict how the New Jersey Supreme Court would treat an ejection case like Shubert at this time. However, the various general principles stated in such cases as *Shubert*, *Uston*, and *Marzocca* still guide our consideration of more recent case law arising out of the specific sports context.

Courts across the country have recently struggled to deal with litigation arising out of the often complicated ticket arrangements between teams and their fans. Season ticket-holders accordingly have sued teams, with varying degrees of success, claiming that some action (e.g., moving the team itself to another city) violated either their renewal rights or other rights related to their status as season ticket-holders. *See, e.g., Oshinsky v. N.Y. Football Giants, Inc.*, Civil Action No. 09-cv-1186 (PGS), 2009 U.S. Dist. LEXIS 107608, 2009 WL 4120237, *4-*10 (D.N.J. Nov. 17, 2009); *Brotherson v. Prof'l Basketball Club, LLC*, 604 F. Supp. 2d 1276, 1283-96 (D. Wash. 2009); *Charpentier v. L.A. Rams Football Co.*, 75 Cal. App. 4th 301, 308-16, 89 Cal. Rptr. 2d 115 (1999); *Miami Dolphins, Ltd. v. Genden & Bach, P.A.*, 545 So.2d 294, 295-96 (Fla. Dist. Ct. App. 1989) (per curiam); *Skalbania v. Simmons*, 443 N.E.2d 352, 356-63 (Ind. Ct. App. 1982); *Wichita State Univ. Intercollegiate Athletic Ass'n v. Marrs*, 29 Kan. App. 2d 282, 28 P.3d 401, 402-04 (Kan. Ct. App. 2001) (per curiam); *Yarde Metals, Inc. v. New England Patriots Ltd. P'ship*, 64 Mass. App. Ct. 656, 834 N.E.2d 1233, 1235-38 (Mass. App. Ct. 2005); *Strauss v. Long Island Sports, Inc.*, 60 A.D.2d 501, 401 N.Y.S.2d 233, 235-38 (App. Div. 1978); *Bickett v. Buffalo Bills, Inc.*, 122 Misc. 2d 880, 472 N.Y.S.2d 245, 247-48 (Sup. Ct. 1983); *Beder v. Cleveland Browns, Inc.*, 129 Ohio App. 3d 188, 717 N.E.2d 716, 719-23 (Ohio Ct. App. 1998); *Stern v. Cleveland Browns Football Club, Inc.*, No. 95-L-196, 1996 Ohio App. LEXIS 5802, 1996 WL 761163, at *5-*6 (Ohio Ct. App. December 20, 1996) . Similarly, other courts have addressed the closely related question of whether such alleged renewal rights may be sold by the bankruptcy trustee. *See, e.g., Abele v. Phoenix Suns Ltd. P'ship (In re Harrell)*, 73 F.3d 218, 219-20 (9th Cir.

1996) (per curiam); *Grossman v. Boston Red Sox Baseball Club Ltd. P'ship (In re Platt)*, 292 B.R. 12, 17-18 (Bankr. D. Mass. 2003); *In re Liebman*, 208 B.R. 38, 39-41 (Bankr. N.D. Ill. 1997); *In re I.D. Craig Serv. Corp.*, 138 B.R. 490, 493-502 (Bankr. W.D. Pa. 1992).

Nevertheless, the existing "season ticket" case law ultimately does not really help Mayer. Several of these cases have actually indicated that there may be different and distinct kinds of rights or interests implicated in the season ticket context. For instance, the bankruptcy court in Craig stated "that the conclusion does not follow that, because each single ticket is a revocable license, [the team] can either deny Trustee's request to transfer his season ticket status or refuse to recognize that status in his transferees." *Craig*, 138 B.R. at 494. On the contrary, the Craig court expressly recognized that "[t]he game tickets themselves and the right to renew the season tickets are two separate and distinct interests of this estate." *Id.* We are not concerned here with the relatively more straight-forward issue of *renewal rights*. Reduced to its essence, the current appeal before us is concerned with the alleged existence of a very specific but very different and unusual right: namely, the right of a ticket-holder to see an "honest" game played in compliance with the fundamental rules of the NFL itself (which was then allegedly denied to Mayer and his fellow ticket-holders because of the secret and illicit videotaping program undertaken by the Patriots and Belichick).

Although the factual circumstances and claims before this Court appear to be rather unique, several courts have addressed relatively similar theories of liability

with respect to the related issues of alleged poor performance and rule violations. The District Court itself cited to some of these decisions, and it specifically focused on two of them: *Bowers v. Federation Internationale De L'Automobile*, 489 F.3d 316 (7th Cir. 2007), and *Castillo v. Tyson*, 268 A.D.2d 336, 701 N.Y.S.2d 423 (App. Div. 2000) (mem. decision). Both of these rulings provide clear support for the District Court's dismissal of Mayer's complaint.

The *Bowers* litigation arose out of a Formula One car race in Indianapolis, where fourteen of the original twenty cars did not participate because a serious tire flaw made their tires dangerous to use at full speed on one part of the track. *Bowers*, 489 F.3d at 319. The entire heated affair was dubbed "Indygate." *Id.* at 320. Disappointed fans sued, seeking the expenses they had incurred to attend the race, and alleging, inter alia, that the Formula One racing rules require at least twelve cars to participate in any race. *Id.* at 320-21. The Seventh Circuit affirmed the District Court's dismissal of the various claims advanced by the plaintiffs. *Id.* at 320-25.

Of particular significance here, the appellate court initially stated that any breach of contract claim "arguably should fail because IMS [the race track hosting the event] promised only to admit the plaintiffs to the race grounds on the days of the grand prix." *Id.* at 321. It went on to state the following:

> While we are unaware of any Indiana case addressing the nature of a contract formed by the sale of an admission ticket, cf. [*Skalbania*, 443 N.E.2d at 352] (addressing a class

> certification question in a breach of contract action by season ticket holders against a hockey franchise, but explicitly reserving the merits), most states agree that the seller contracts only to admit the plaintiff to its property at a given time. The plaintiff buys the ticket, of course, in order to see an event that is scheduled to occur on the ticket-seller's grounds, but the seller does not contract to provide the spectacle, only to license the plaintiff to enter and "view whatever event transpire[s]." [*Castillo*, 701 N.Y.S.2d at 423].

Id. (other citations omitted). Noting that one certainly could contract to provide a spectacle, the *Bowers* court questioned why an exhibitor like the race track here would do so given its lack of control over the performers and their scheduled performances. *Id.* Furthermore, a patron "could reasonably decide to do without a contractual right to the spectacle itself, trusting that the exhibitor will work with the performers to ensure that the spectacle goes off lest both develop a bad reputation that could damage their future business." *Id.* The Seventh Circuit then noted that Formula One racing has struggled to take root in the United States, that the effects of Indygate on the sport's reputation was a serious concern for everyone involved, and that there was speculation that the sport might never hold a race at the track again. *Id.*

Acting out of an abundance of caution because of the absence of Indiana case law on point, the Seventh Circuit ultimately purportedly rested its ruling on other grounds. *Id.* at 321-25. It thereby assumed that the plaintiffs did in fact possess a contractual right to a

"regulation Formula One race" as well as a right "to have the race stewards properly interpret the applicable regulations on the spot." *Id.* at 321 But, among other things, the appellate court found that a six-car race was not actually prohibited or otherwise nonsensical under the Formula One rules. *Id.* at 322. Accordingly, there was no reason to claim, "as the plaintiffs in all seriousness do, that no race occurred." *Id.* Furthermore, the court further discussed the limited scope of the underlying ticket or license. It therefore noted that a sporting contest is not invalidated merely because of a player's poor effort. *Id.* Insofar as plaintiffs themselves received a "regulation race," "they admit that they had no additional right to a race that was *exciting* or drivers that competed *well*." *Id.* (citations omitted). In discussing the promissory estoppel claim, the court likewise observed that numerous factors, ranging from a driver's sudden illness to an accident shipping a car to the track, could prevent a full complement of cars from racing at a particular location on a particular day. *Id.* at 324.

Quoted by the *Bowers* court, the New York Appellate Division in *Castillo* confronted a seemingly unique situation of its own. The plaintiffs sought a refund of the money they paid to see a boxing match after one of the boxers, Mike Tyson, was disqualified for biting his opponent's ear. *Castillo*, 701 N.Y.S.2d at 424. Invoking (like Mayer himself) a long list of legal theories, the plaintiffs "claim that they were entitled to view a 'legitimate heavyweight title fight' fought 'in accordance with the applicable rules and regulations' of the governing boxing commission." *Id.* But the Appellate Division upheld the trial court's dismissal of the complaint *Id.* at 424-25. Among other things, it

noted that there was nothing in any contract promising a fight that did not end in a disqualification. *Id.* at 424. On the contrary, the rules themselves "provide for disqualification and it is a possibility that a fight fan can reasonably expect." *Id.* In specifically rejecting the unjust enrichment claim, the Appellate Division reasoned "that plaintiffs received what they paid for, namely, 'the right to view whatever event transpired.'" *Id.* at 425.

As highlighted by the District Court itself as well as both the Seventh Circuit and the New York Appellate Division, numerous other decisions provide yet further support for this reasoning. For instance, the Seventh Circuit stated the following, admittedly in a case involving a debt collection arrangement: "That the Chicago Cubs turn out to be the doormat of the National League would not entitle the ticket holder to a refund for the remaining games, any more than the star tenor's laryngitis entitles the opera goer to a refund when the understudy takes over the role." *Seko Air Freight, Inc. v. Transworld Sys., Inc.*, 22 F.3d 773, 774 (7th Cir. 1994). On the contrary, the fan's remedy would be to "head south for Comiskey Park and the White Sox."[4] *Id.* We believe that the New Jersey Supreme Court would follow the reasoning adopted by both the District Court as well as by the overwhelming weight of the case law.

The District Court, in turn, properly applied this reasoning in the present circumstances. Mayer possessed either a license or, at best, a contractual right to enter Giants Stadium and to have a seat from which to watch a professional football game. In the clear language of the ticket stub, "[t]his ticket only grants

entry into the stadium and a spectator seat for the specified NFL game." (SA4.) Mayer actually was allowed to enter the stadium and witnessed the "specified NFL game[s]" between the Jets and Patriots. He thereby suffered no cognizable injury to a legally protected right or interest.

Accordingly, we need not, and do not decide, whether a ticket-holder possesses nothing more than a license to enter and view whatever event, if any, happens to transpire. Here, Mayer undeniably saw *football* games played by two *NFL* teams. This therefore is not a case where, for example, the game or games were cancelled, strike replacement players were used, or the professional football teams themselves did something nonsensical or absurd, such as deciding to play basketball. *See, e.g.*, *Bowers*, 489 F.3d at 322 ("But, while a six-car race under the Regulations may be less rich, interesting or challenging than a twelve-car race, it is not prohibited or nonsensical under the rules (like a soccer match between three teams or a basketball team getting a first down)."); *Miami Dolphins*, 545 So.2d at 295-96 (upholding enforcement of fee abatement provision in club seat license agreement because Miami Dolphins used replacement players during strike); *Skalbania*, 443 N.E.2d at 354-63 (affirming certification of season ticket-holder class where Indiana Racers did not finish season because of team's business collapse); *Bickett*, 472 N.Y.S.2d at 247-48 (rejecting claims arising out of cancellation of games by Buffalo Bills due to strike).

Furthermore, we do recognize that Mayer alleged that he was the victim, not of mere poor performance by a team or its players, but of a team's ongoing acts of

dishonesty or cheating in violation of the express rules of the game. Nevertheless, there are any number of often complicated rules and standards applicable to a variety of sports, including professional football. It appears uncontested that players often commit intentional rule infractions in order to obtain an advantage over the course of the game. For instance, a football player may purposefully commit pass interference or a "delay of game." Such infractions, if not called by the referees, may even change the outcome of the game itself. There are also rules governing the off-field conduct of the football team, such as salary "caps" and the prohibition against "tampering" with the employer-employee relationships between another team and its players and coaches. Mayer further does not appear to contest the fact that a team is evidently permitted by the rules to engage in a wide variety of arguably "dishonest" conduct to uncover an opponent's signals. For example, a team is apparently free to take advantage of the knowledge that a newly hired player or coach takes with him after leaving his former team, and it may even have personnel on the sidelines who try to pick up the opposing team's signals with the assistance of lip-reading, binoculars, note-taking, and other devices. In addition, even Mayer acknowledged in his amended complaint that "[t]eams are allowed to have a limited number of their own videographers on the sideline during the game." (A21.)

In fact, the NFL's own commissioner (like the boxing officials in *Castillo* and the various parties in *Bowers*) did ultimately take action here. He found that the Patriots and Belichick were guilty of violating the applicable NFL rules, imposed sanctions in the form of

fines and the loss of draft picks, and rather harshly characterized the whole episode as a calculated attempt to avoid well-established rules designed to encourage fair play and honest competition. At least in this specific context, it is not the role of judges and juries to be second-guessing the decision taken by a professional sports league purportedly enforcing its *own* rules. In fact, we generally lack the knowledge, experience, and tools in which to engage in such an inquiry. For instance, there appear to be no real standards or criteria that a legal decision-maker may use to determine when a particular rule violation gives rise to an actionable claim or should instead be accepted as a usual and expected part of the game. At the very least, a ruling in favor of Mayer could lead to other disappointed fans filing lawsuits because of "a blown call" that apparently caused their team to lose or any number of allegedly improper acts committed by teams, coaches, players, referees and umpires, and others. This Court refuses to countenance a course of action that would only further burden already limited judicial resources and force professional sports organizations and related individuals to expend money, time, and resources to defend against such litigation. *See, e.g.*, *Bickett*, 472 N.Y.S.2d at 248 ("Buffalo News sports editor, Larry Felser, in his column of May 30, 1983 warned of the dire consequences of permitting such a theory of recovery to exist, 'If the fan (plaintiff) wins against the Bills, every lawyer in Western New York could use the precedent to finance a vacation to the Riviera.'"). Under the circumstances, public policy considerations evidently weigh against Mayer and his various claims. *See Garifine*, 148 A.2d at 2-3.

In conclusion, this Court will affirm the dismissal of Mayer's amended complaint. Again, it bears repeating that our reasoning here is limited to the unusual and even unique circumstances presented by this appeal. We do not condone the conduct on the part of the Patriots and the team's head coach, and we likewise refrain from assessing whether the NFL's sanctions (and its alleged destruction of the videotapes themselves) were otherwise appropriate. We further recognize that professional football, like other professional sports, is a multi-billion dollar business. In turn, ticket-holders and other fans may have legitimate issues with the manner in which they are treated. *See, e.g., Charpentier*, 75 Cal. App. 4th at 314 ("It is common knowledge that professional sports franchisees have a sordid history of arrogant disdain for the consumers of the product." (footnote omitted)). Significantly, our ruling also does not leave Mayer and other ticket-holders without any recourse. Instead, fans could speak out against the Patriots, their coach, and the NFL itself. In fact, they could even go so far as to refuse to purchase tickets or NFL-related merchandise. *See, e.g., Bowers*, 489 F.3d at 321 (noting possible effects of bad reputation on future prospects of sport); *Seko*, 22 F.3d at 774 (stating that, "instead of going to the Cubs game, the fan may head south for Comiskey Park and the White Sox"). However, the one thing they *cannot* do is bring a legal action in a court of law.

V.

For the foregoing reasons, we will affirm the District Court's order dismissing Mayer's amended complaint in its entirety.

Footnotes

*Honorable Gene E.K. Pratter, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

1A license, for our purposes, is generally defined as "[a] permission, usu. revocable, to commit some act that would otherwise be unlawful; esp., an agreement (not amounting to a lease or profit a prendre) that it is lawful for the licensee to enter the licensor's land to do some act that would otherwise be illegal, such as hunting game." Black's Law Dictionary 1002 (9th ed. 2009).

2It appears that the plaintiff was actually a show business competitor of the defendants. *See Garifine v. Monmouth Park Jockey Club*, 29 N.J. 47, 148 A.2d 1, 4 (N.J. 1959)

3Specifically, the Shubert court stated, inter alia, that:

> The position of the defendants is that the sale of the tickets gave rise only to a personal license, revocable at any time, and whose revocation would confer no right of action, except for the money paid, with such incidental damages as would arise from the expense and inconvenience of going to the theater to no purpose. . . .
>
> . . . .
>
> . . . . It was held that plaintiff might recover in contract the price of his ticket and all legal

> damages sustained by the breach of the contract implied by the sale and delivery of the ticket . . . .

Shubert, 83 A. at 369-70.

4Other courts have made similar statements as to the absence of a cause of action arising out of bad performance or, more generally, the subjective expectations of the ticket-holders. *See, e.g., Brotherson*, 604 F. Supp. 2d at 1296 ("Plaintiffs may have enjoyed Sonics games less as it became more likely that the team would leave Seattle at the end of the season, but that is at best the sort of mental injury that the [Washington consumer protection statute] does not recognize."); *Charpentier*, 75 Cal. App. 4th at 314 (rejecting claim of breach of covenant of good faith and fair dealing because "plaintiff did not buy the right to watch a good team or to have enlightened (in his opinion) management decisions made" (citation omitted)); *Strauss*, 401 N.Y.S.2d at 235-38 (finding class action was not appropriate where season ticket-holder filed suit against New York Nets because the team traded Julius Erving to the Philadelphia 76ers); *Bickett*, 472 N.Y.S.2d at 248 ("Obviously, 'diminished quality' lies in the eyes of the beholder."); *Beder*, 717 N.E.2d at 725 ("That the Browns performed poorly after the announced move to Baltimore cannot serve as a basis from which to find that the Browns breached their contract with season ticket holders. To allow recovery under such a theory would enable any ticket holder not satisfied with the performance of whatever entertainment the ticket procured to seek a refund for such a subjective and unreasonable response." (citations omitted)); *Stern*, 1996 Ohio App. LEXIS 5802, 1996 WL 761163, at *6 ("Additionally, to the extent that appellant

sought a refund for his 1995 tickets based on the poor performance by the team after the November 6, 1996 announcement [of its relocation], we refuse to recognize such a cause of action.").

Civil Action No. 07-4671 (GEB)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CARL J. MAYER, on behalf of himself and all others similarly situated, Plaintiffs, v. BILL BELICHICK; THE NEW ENGLAND PATRIOTS; and THE NATIONAL FOOTBALL LEAGUE, Defendants.

March 23, 2009, Decided
March 23, 2009, Filed

MEMORANDUM OPINION

BROWN, Chief Judge

This matter comes before the Court upon Defendants' Bill Belichick and the New England Patriots' Motion to Dismiss (Docket Entry No. 15) and Defendant the National Football League's Motion to Dismiss (Docket Entry No. 18). The Court has reviewed the parties' submissions, including a submission by Amicus Curiae the New York Jets, and decided the motions without oral argument pursuant to Federal Rule of Civil Procedure 78. For the reasons that follow, the Court will grant both Motions to Dismiss without prejudice.

I. BACKGROUND

Plaintiff, a New York Jets season ticket-holder, brings the instant suit "on behalf of himself and all others similarly situated," against Bill Belichick, the New England Patriots, and the National Football League ("NFL") alleging various causes of action due to that

which has been coined "spy-gate." Plaintiff alleges that he is entitled to statutory, punitive, and compensatory damages, restitution, equitable relief, and attorneys' fees and costs because "Defendants, during a game with the New York Jets on September 9, 2007, [and on other unspecified occasions,] instructed an agent of the Defendants to surreptitiously videotape the New York Jets coaches and players on the field with the purpose of illegally recording, capturing and stealing the New York Jets signals and visual coaching instructions." (Docket Entry No. 7 at 1 to 2.)

Plaintiff alleges that video recording these signals and instructions constituted cheating and violated the League's rules, which state that "no video recording devices of any kind are permitted to be in use in the coaches' booth, on the field, or in the locker room during the game." (*Id.* at ¶¶ 5,15, and 16.) Plaintiff further alleges that this activity "violated the contractual expectations and rights of New York Jets ticket-holders who fully anticipated and contracted for a ticket to observe an honest match played in compliance with all laws, regulations and NFL rules." (*Id.* at ¶ 2.) As a result of their activities and after an internal investigation, the NFL fined Bill Belichick, the coach of the Patriots, $ 500,000, and fined the Patriots $ 250,000. (*Id.* at ¶ 18.) The Commissioner of the NFL Roger Goodell also ordered that the tapes produced should be destroyed. (*Id.* at ¶ 43.)

Plaintiff seeks class certification "on behalf of himself and a Nationwide Class of similarly situated persons," who shall include "[a]ll New York Jets season ticket-holders and other ticket-holders who purchased tickets to games between the New York Jets and the New

England Patriots in Giants stadium since Bill Belichick became head coach . . . in 2000" and "[a]ll individuals that are residents of the State of New Jersey and that purchased tickets to watch the New York Jets play the New England Patriots between 2000 and 2007 in Giants stadium" but excluding "the officers, directors, and employees of Defendants, and the legal representatives, heirs, successors, and assigns of Defendants." (*Id.* at ¶ 46, 49, 51.)

II. DISCUSSION

The thrust of Plaintiff's arguments is that he, as a season ticket holder, "anticipated and contracted for a ticket to observe an honest match played in compliance with all laws, regulations and NFL rules." (Docket Entry No. 7 at ¶ 2.) Plaintiff asserts a variety of causes of action in his Amended Complaint against the New England Patriots, Bill Belichick, and the NFL: tortious interference with contractual relations, common law fraud, deceptive business practices, violations of the New Jersey and federal racketeering statutes, violations of the New Jersey Consumer Fraud Act, and breach of contract, quasi-contract, and contractual rights as third party beneficiaries. However, the Court's consideration of each of these causes of action as it applies to these cases results in the same underlying gap. Plaintiff has not asserted an actionable injury insofar as he states that upon presentment of his ticket at Giants Stadium, he was permitted entry, and he was able to view a football game between the New York Jets and the New England Patriots. Plaintiff's subjective expectations regarding how the game would be played and what decisions the respective coaches would make, right or wrong, even if these actions

constituted "cheating," was not anything that he either received license to or contracted for. Rather, Plaintiff's ticket was redeemed, and he was able to see whatever transpired at Giants Stadium on that date, in this case, a football game, and as a result, Plaintiff got exactly that for which he paid. Therefore, for these reasons and those to follow in this Memorandum Opinion, the Court grants Defendants' motions and dismisses Plaintiff's Amended Complaint in its entirety.

A. Standard of Review

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) may be granted only if, accepting all well-pleaded allegations in the complaint as true and viewing them in the light most favorable to the plaintiff, a court finds that the plaintiff has failed to set forth fair notice of what the claim is and the grounds upon which it rests. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (citing *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)).

A complaint will survive a motion under Rule 12(b)(6) if it states plausible grounds for plaintiff's entitlement to relief sought. *Id.* at 1965-66 (abrogating *Conley's* standard that the "complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"). In other words, it must contain sufficient factual allegations to raise a right to relief above the speculative level. *Id.* at 1965. The issue before the Court "is not whether plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence in support of the claims." *Burlington Coat Factory Sec.*

Litig., 114 F.3d 1410, 1420 (3d Cir. 1997) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)). In evaluating a Rule 12(b)(6) motion to dismiss for failure to state a claim, a court may consider only the complaint, exhibits attached to the complaint, matters of public record, and undisputedly authentic documents if the complainant's claims are based upon those documents. *See Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir. 1993), *cert. denied*, 510 U.S. 1042, 114 S. Ct. 687, 126 L. Ed. 2d 655 (1994).

B. Plaintiffs Have Not Asserted Any Actionable Injury

The issue in this case is whether the actions of Defendants Belichick and the New England Patriots result in an actionable claim under any of the causes of action identified in the Amended Complaint. This Court holds that they do not. "The uniform weight of established case law holds that a failure to satisfy the subjective expectations of spectators at a sporting event is not actionable under law." *In re 2005 United States Grand Prix*, 461 F. Supp. 2d 855 (7th Cir. 2006). "[M]ost states agree that the seller contracts only to admit the plaintiff to its property at a given time. The plaintiff buys the ticket, of course, in order to see an event that is scheduled to occur on the ticket-seller's grounds, but the seller does not contract to provide the spectacle, only to license the plaintiff to enter and 'view whatever event transpire[s]." *Bowers v. Fed'n Internationale De L'Automobile*, 489 F.3d 316, 321 (7th Cir. 2007) (citing *Castillo v. Tyson*, 268 A.D.2d 336, 337, 701 N.Y.S.2d 423, 425 (N.Y. App. Div. 2000)). *See also*

Petrich v. MCY Music World, Inc., 371 Ill. App. 3d 332, 862 N.E.2d 1171, 1180, 308 Ill. Dec. 968 (Ill App. Ct. 2007); *Yarde Metals, Inc. v. New England Patriots Ltd. P'ship*, 64 Mass. App. Ct. 656, 834 N.E.2d 1233, 1236 (Mass. App. Ct. 2005); *Sweeney v. United Artists Theater Circuit, Inc.*, 119 P.3d 538, 540-41 (Colo. Ct. App. 2005); *Six Flags Theme Parks, Inc. v. Dir. of Revenue*, 102 S.W.3d 526, 533 (Mo. 2003); *Wichita State Univ. Intercollegiate Athletic Ass'n v. Marrs*, 29 Kan. App. 2d 282, 28 P.3d 401, 403 (Kan Ct. App. 2001). *But see Miami Dolphins, Ltd. v. Genden & Bach, P.A.*, 545 So. 2d 294, 296 (Fla. Dist. Ct. App. 1989) (holding that a refund was due to season ticket holder when labor strikes resulted in the cancellation of games and the team played a game using strikebreakers). "By no means does the purchase of a ticket entitle the purchaser to any level of quality in an event or performance." Brian A. Rosenblatt, *I Know, It's Only Rock and Roll, But Did They Like It?: An Assessment of Causes of Action Concerning the Disappointment of Subjective Consumer Expectations Within the Live Performance Industry*, 13 U.C.L.A. Ent. L. Rev. 33, 37-38 (2005) (citing *Charpentier v. Los Angeles Rams Football Co.*, 75 Cal. App. 4th 301, 89 Cal. Rptr. 2d 115, 124 (Cal. Ct. App. 1999)).

Although Plaintiff quotes the NFL rule that was apparently violated to substantiate each of the other common law and statutory claims that is made in the Amended Complaint, such a violation does not amount to an action at law. The actions of Defendants "at most, yielded a non-actionable loss of goodwill" and "[a]ny further grievance or disgruntlement on the part of Plaintiffs must be pursued, if at all, in the marketplace, through fan withdrawal of money and attendance at

future . . . events." *In re 2005 United States Grand Prix*, 461 F. Supp. 2d at 862. In cases where spectators "receive[] what they paid for, namely, 'the right to view whatever event transpired,'" such ticket-holders have not asserted an actionable injury when a rule governing the play of that event has been violated. *Castillo v. Tyson*, 268 A.D.2d 336, 337, 701 N.Y.S.2d 423, 425 (N.Y. App. Div. 2000).

Although there are few cases on point, in general in New Jersey, a "ticket is to be regarded as a mere license, for the revocation of which before the holder has actually been given his seat, and has taken it, the only remedy is in *assumpsit* for a breach of the contract." *Shubert v. Nixon Amusement Co.*, 83 N.J.L. 101, 105, 83 A. 369 (N.J. Sup. Ct. 1912). As the language of the New Jersey Supreme Court in *Shubert* suggests, there may be a remedy where a ticket has not been honored, but there is no remedy at law where the ticket-holder has been granted admission and subsequently complains about the quality, or here, the "honesty," of the conduct of the event. This principle has also been recognized by courts in cases such as *In re 2005 United States Grand Prix* and *Castillo v. Tyson*, and this Court follows the lead of those decisions.

Plaintiff creatively identifies nine separate causes of action in his Amended Complaint, but because the Court has determined that there is no actionable injury given that Plaintiff has not alleged an actionable injury, the Court need not address each individual count listed in the Amended Complaint. All of Plaintiff's claims hinge on the allegations, which for the purposes of these motions the Court accepts as true, regarding the dishonesty of tape recording signals, and therefore,

each is fundamentally flawed. To this end, there is also no actionable claim against the NFL for "destroying" the tapes at issue. Accordingly, the Court dismisses the Amended Complaint in its entirety as it applies against the three Defendants.

III. CONCLUSION

For the foregoing reasons, the Court grants Defendants' Belichick and the New England Patriots' Motion to Dismiss, and the Court grants the NFL's Motion to Dismiss. An appropriate form of Order accompanies this Opinion.

Dated: March 23, 2009

/s/ Garrett E. Brown, Jr.

GARRETT E. BROWN, JR., U.S.D.J.

No. 09-2237

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CARL J. MAYER,
Appellant

v.

BILL BELICHICK; THE NEW ENGLAND PATRIOTS; NATIONAL FOOTBALL LEAGUE

SUR PETITION FOR REHEARING

Present: MCKEE, Chief Judge, SLOVITER, SCIRICA, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE and COWEN*, Circuit Judges and PRATTER*, District Judge

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,
/s/ Robert E. Cowen
Circuit Judge
Dated: September 1, 2010

Footnotes

* Limited to Panel Rehearing Only

* Honorable Gene E.K. Pratter, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

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No. 10-867

IN THE

Supreme Court of the United States

CARL J. MAYER,

Petitioner,

v.

BILL BELICHICK, THE NEW ENGLAND PATRIOTS, and NATIONAL FOOTBALL LEAGUE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents National Football League and The New England Patriots make the following disclosure:

The National Football League has no parent corporation and no publicly held company owns 10% or more of its stock;

The New England Patriots have no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

In what the Petition characterizes as a "highly unusual," "novel and unprecedented" case, *see, e.g.*, Pet. at 6-7, Petitioner Carl J. Mayer seeks review of a decision from the Third Circuit that affirmed the district court's dismissal of Mr. Mayer's complaint for failure to state a claim. Petitioner had filed suit in the District of New Jersey seeking recovery on behalf of a putative class of New York Jets fans who attended Jets home games played against the New England Patriots. The complaint sought, inter alia, punitive damages and recovery of the amounts paid to attend these games, and set forth numerous counts (eight under state law, one under federal law). All of Mr. Mayer's claims were premised on the allegation that the Patriots broke a National Football League ("NFL" or "League") rule when a Patriots employee videotaped Jets coaches and players from the sideline in order to capture the coaches' signals and instructions. While the NFL does not prohibit observing opposing coaches' signal-calling during a game, it does prohibit sideline videotaping of such signal-calling. After conducting an investigation, the NFL found that the Patriots had violated the rule and imposed various penalties against the team and its head coach.

On the motions to dismiss filed by the NFL and the Patriots, the district court made the unremarkable finding – consistent with every other case to address similar claims – that fans attending games cannot state a cause of action against the teams playing the game (or the League) based on a violation of League rules governing the conduct of the sport being played. Pet. App. 34a-35a. The

complaint was dismissed in its entirety without prejudice. No amended complaint was subsequently filed.

The Third Circuit unanimously affirmed, holding that Mr. Mayer "was allowed to enter the stadium and witnessed the 'specified NFL game[s]' between the Jets and Patriots. He thereby suffered no cognizable injury to a legally protected right or interest." Pet. App. at 25a (alteration in original). Setting aside as irrelevant the question of whether Mr. Mayer's game ticket constituted a license or a contract, the circuit court found that, "[a]t best, [Mr. Mayer] possessed nothing more than a contractual right to a seat from which to watch an NFL game between the Jets and the Patriots, and this right was clearly honored." *Id.* at 14a.

The Third Circuit also found that its decision was grounded in important policy considerations – in particular, that a finding in favor of Petitioner would leave the court system overrun by disappointed fans filing similar lawsuits based on alleged "blown call[s]" or rule violations committed by teams on or off the field. *See id.* at 27a. Mr. Mayer's subsequent petition for en banc review was denied.

REASONS FOR DENYING THE PETITION

None of the Petition's six Questions Presented sets forth an issue that warrants this Court's review. Rejecting a sports fan's claims that are premised on a violation of a professional sports league's rules of play is consistent with uniform, settled law as well as logic. Petitioner does not identify any conflict between the Third Circuit's decision and (a) any other circuit court decision; (b) any decision by this

Court; or (c) even any lower court or state court decision. Instead, Petitioner simply seeks to relitigate before this Court the same claims that the district court (as affirmed by the Third Circuit) dismissed below. Petitioner also improperly seeks to raise new arguments that he did not make in the lower courts. The petition for a writ of certiorari should be denied.

I. Petitioner Admits There Is No Conflict Among The Circuit Courts of Appeals

Petitioner does not even attempt to argue that a conflict exists between the Third Circuit's decision and the decision of another circuit court of appeals. Of course, the lack of a circuit court conflict is not surprising given the novel nature of Petitioner's claim. As the Third Circuit noted, "no one in the past has ever brought a legal action quite like this one." Pet. App. at 14a.

In fact, all of the cases that have considered any claims even remotely analogous to Petitioner's lawsuit have reached the same result as the Third Circuit – i.e., that fans may not state a claim based on events, such as purported rule violations, that transpire during a sporting event. *See Bowers v. Fédération Internationale de l'Automobile*, 489 F.3d 316 (7th Cir. 2007) (affirming dismissal of lawsuit brought by fans who attended auto race and claimed race did not include as many cars as required by racing body's rules); *Castillo v. Tyson*, 701 N.Y.S.2d 423 (App. Div. 2000) (affirming dismissal of lawsuit brought by fans who attended boxing match that ended in disqualification when participant bit ear of his opponent in violation of boxing rules). The Third

Circuit found that these cases and "numerous other decisions" have all held that a spectator at a sporting event has no legally cognizable right based on his disappointed subjective expectations as to how that event or game should have been played or officiated. *See* Pet. App. at 24a.

II. Petitioner Does Not Show A Conflict Between The Third Circuit's Decision And Any Of This Court's Decisions

Petitioner concedes that the Third Circuit's decision in no way conflicts with this Court's decision in *Marrone v. Washington Jockey Club of District of Columbia*, 227 U.S. 633 (1913), wherein this Court held that a race track could eject a person even though he had a ticket because he was suspected of having previously "doped" or drugged a horse. *See* Pet. at 22; Pet. App. at 15a. In an opinion written by Justice Oliver Wendell Holmes, the Court stated, "We see no reason for declining to follow the commonly accepted rule," and found that the plaintiff was properly denied admission because the ticket "must be either a conveyance or a license, subject to be revoked." *Marrone*, 227 U.S. at 636-37.

Petitioner here argues for the first time in this litigation that the Supreme Court should "update" this precedent. As a threshold matter, any such argument has been waived because Petitioner failed to raise these issues before the courts below. *See Kosak v. United States*, 465 U.S. 848, 850 n.3 (1984) (citing *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977)) ("Because petitioner did not present this argument to the Court of Appeals, we decline to consider it.").

Even if the Court were inclined to reconsider *Marrone*, this case does not represent an appropriate vehicle to do so. As the Third Circuit rightly pointed out, in contrast to the plaintiff in *Marrone*, Petitioner's individual game ticket was honored; the game simply did not meet his subjective expectations as to how an NFL game should be played. *See* Pet. App. at 16a-17a ("Given that [Petitioner] was never barred or expelled from any game at Giants Stadium, much more is needed to establish a cognizable right . . . .").

Petitioner also fails to identify any conflict between the Third Circuit's decision and this Court's decision in *American Needle, Inc. v. National Football League*, 130 S. Ct. 2201 (2010). *See* Pet. at 23. In *American Needle* this Court examined a narrow issue specific and limited to the federal antitrust laws – viz., whether, with respect to their collective intellectual property licensing, the NFL teams were capable of conspiring under § 1 of the Sherman Act, 15 U.S.C. § 1. *See* 130 S. Ct. at 2208.

None of Petitioner's claims even touches on the federal antitrust laws or the issues addressed in *American Needle*. His only federal law claim was based on the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, and raised no issues regarding the capacity of teams to conspire under the Sherman Act. *See* Pet. at 28.

III. The Third Circuit's Decision Does Not Conflict With Any Lower Court Case

Petitioner argues that the Third Circuit's decision conflicts with several federal district court cases relating to rights associated with season ticket

packages. Contrary to Petitioner's suggestion, the allegedly "conflicting" lower court cases are reconcilable with the Third Circuit's decision. As the Third Circuit itself noted, some courts have found that a fan's purchase of a season ticket package sold by an NFL team may include certain contractual rights (e.g., the right to a parking pass for that team's home games, the right to renew the season ticket package for the next season). *See* Pet. App. at 19a-20a; *see also Beder v. Cleveland Browns, Inc.*, 717 N.E.2d 716 (Ohio Ct. App. 1998) (examining whether team relocation breached season ticket package holders' alleged contractual right of first refusal to purchase season ticket package for next season); *Brotherson v. Prof'l Basketball Club, L.L.C.*, 604 F. Supp. 2d 1276 (W.D. Wash. 2009) (examining whether team relocation breached season ticket package holders' alleged contractual option to renew season ticket package for next season); *Charpentier v. L.A. Rams Football Co.*, 89 Cal. Rptr. 2d 115, 123-24 (Ct. App. 1999) (finding that season ticket package holder may have claim for fraud where team relocated after knowingly making false statements denying its intention to do so in order to maintain sales of season ticket packages in existing location); *Skalbania v. Simmons*, 443 N.E.2d 352, 354, 358 (Ind. Ct. App. 1982) (noting that season ticket package holders may be entitled to refund of amount paid for alleged breach of contract where team financially collapsed and did not play twenty-seven scheduled home games); *Oshinsky v. N.Y. Football Giants, Inc.*, No. 09-cv-1186 (PGS), 2009 WL 4120237 (D.N.J. Nov. 17, 2009) (examining alleged contractual right of season ticket package holder to renew season ticket package for next season).

However, as the Third Circuit noted, at issue in this case was a "very specific but very different and unusual [alleged] right" based on a fan's subjective expectations as to how NFL games should be played: "namely, the right of a ticketholder to see an 'honest' game played in compliance with the fundamental rules of the NFL itself." *See* Pet. App. at 20a. Dispositively, the circuit found that language on the game ticket itself granted Petitioner only admission for that specific NFL game and did not confer any legally cognizable right as to his expectations with respect to how that game would be played. *See id.* at 24a-25a.

IV. Petitioner's Purported "Conflicts" Relate Only To Issues of State Law, Not Federal Law

While ultimately irrelevant because there are no conflicts, the issues that Petitioner raises all relate to issues of state law. *See* Pet. at 15-19 (discussing *Beder*, 717 N.E.2d 716 ("plaintiffs' claims in contract, fraud and violation of the Ohio consumer protection act"), *Brotherson*, 604 F. Supp. 2d 1276 ("consumer protection statute of Washington state"), *Skalbania*, 443 N.E.2d 352 ("claims for breach of contract, common law fraud, [and] tortious interference with contractual relations"), *Oshinsky*, 2009 WL 4120237 ("contract claim"), as well as, "in the case at bar, claims for tortious interference with contractual relations").[1]

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[1] As noted above, only one of the nine claims in Petitioner's complaint was based on an alleged violation of federal law – i.e., the federal RICO statute. The single

(cont'd)

Thus, the only "conflicts" even asserted rest on issues of state law, and this Court normally does not grant review on such issues – particularly where the circuit court's decision is "altogether reasonable." *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 461 (1995); *see also The Wharf (Holdings) Ltd. v. United Int'l Holdings Inc.*, 532 U.S. 588, 596 (2001) ("[W]e ordinarily will not consider such a state-law issue, and we decline to do so here."). Indeed, the "Court has accepted the interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of the state-law issue without such guidance might have justified a different conclusion." *Bishop v. Wood*, 426 U.S. 341, 346 (1976) (citing cases).[2]

(cont'd from previous page)
paragraph in the Petition that discusses RICO admits that Petitioner seeks merely to relitigate this claim before the Court. Petitioner does not even purport to seek review of any question with respect to RICO's application beyond the facts of this case. *See* Pet. at 28.

[2] Petitioner asserts that these state law issues should have been certified to the New Jersey Supreme Court. Of course, Petitioner chose to bring this lawsuit in federal court and never filed a motion in the Third Circuit seeking certification of any question to the New Jersey Supreme Court. In any event, this Court has routinely declined to consider arguments that have not been developed fully in the record or considered by the circuit court. *See Kosak v. United States*, 465 U.S. 848, 850 n.3 (1984) (citation omitted); *Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 772 n.9 (1994) (stating that argument "was not raised below, so we do not address it").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: February 3, 2011

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No. 10-867

SUPREME COURT, U.S.
FILED
FEB 22 2011
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CARL J. MAYER, PETITIONER

v.

BILL BELICHICK; THE NEW ENGLAND PATRIOTS; NATIONAL FOOTBALL LEAGUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Respondents do not want this Court to grant Mayer's petition so that the NFL and its constituent teams can continue to operate a twenty-first century multi-billion dollar business – the largest in American sport – within a framework of nineteenth century law that grants virtually no rights to ticket-holders/consumers.

The hard truth is that a boy's game has become a man's industry. But the NFL and its teams want the revenues of a heavily subsidized and protected major industry while treating their customers like vassels with no rights.

Consumers of virtually every other product have some federal or state recourse in the event they are sold damaged goods: adulterated food, fraudulent securities, defective toys, dangerous chemicals, misleadingly advertised events, and even misleading service sector products are just some examples. Tickets to professional sporting events remain perhaps the last product in America where not even the most elemental rights are accorded the purchaser.

This view however, has been challenged by federal and state courts in other Circuits and the resulting conflict makes this case ripe for review. In addition, the opinion below conflicts with Supreme Court precedent and there are important questions of national law and policy implicated that favor granting Mayer's petition.

I. RESPONDENTS DO NOT DENY THAT THIS CASE IMPLICATES IMPORTANT ISSUES OF NATIONAL LAW AND POLICY AND THEREFORE THIS COURT SHOULD GRANT THE PETITION.

In their brief, Respondents essentially argue that Mayer's lawsuit is a case of first impression. Respondents point to language used by the Third Circuit, and also cited by Mayer in his petition, indicating as much:

- "This highly unusual case..." Pet. App. 2a.
- "It does appear that the various (and numerous) decisions cited by the District Court and the parties on appeal are distinguishable from the highly unusual (and even unique) circumstances present here. Simply put, no one in the past has ever brought a legal action quite like this one." Pet. App. 14a.
- "Although the factual circumstances and claims before this Court appear to be rather unique..." Pet. App. 20a.
- "... unusual and even unique circumstances presented by this appeal." Pet. App. 28a.

Respondents spend the majority of their brief arguing that this Court should not hear Mayer's case because Mayer has not identified a conflict among Circuits or a conflict between the Third Circuit's decision and any of this Court's decisions.

Even if, *arguendo*, case law is not seen as comprising a conflict among the Circuits, the sweep of the Third Circuit's ruling that no remedy at law or equity exists for a ticket-holder in such circumstances is so broad in its scope (pertaining to nearly every professional sports league) as to, *per se*, comprise a crucial issue of public policy underpinning ticket-holders' legal rights. Since the Third Circuit has effectively held that no right or remedy lies at law or equity in such conditions, a significant legal issue arises as a matter of course.

Respondents ignore the fact that this Court may exercise its judicial discretion to consider cases in which a United States Court of Appeals has decided an important question of federal law or public policy that has not been, but should be, settled by this Court. *See* Supreme Court Rule 10(c).

That the Third Circuit emphasized that Mayer's case is *sui generis* merely underscores the importance of resolving the question of whether ticket-holders' rights reside outside the law. In affirming the District Court's dismissal of Mayer's case by ruling, "[u]nder the circumstances, public policy considerations weigh against Mayer and his various claims" (Pet. App. 27a), the Third Circuit effectively decided an important question of federal law and public policy.

Specifically, the Court ruled that ticket-holders have no legal remedy when they pay money to see admittedly rigged sporting events carried out in violation of NFL rules[1]. This important question has not been settled by this Court. Not one of the plethora of cases cited by Respondents in their briefs filed before this Court, the Third Circuit, or the District Court purports to be a decision of this Court settling this important question of federal law and public policy.

This question should be settled by this Court. The NFL's contract with ticket-holders, as construed by the Third Circuit, is a uniform, national instrument that affects the rights of all ticket-holders equally wherever they reside or attend NFL events.[2] This factor alone renders this issue appropriate for this Court's review. The NFL's own disciplinary actions have also failed to deter ongoing episodes of cheating as described by Mayer in his petition[3]. Respondents did not dispute this important point in their Brief in Opposition and thereby concede it. It is clear that it will take a decision by this Court to settle the matter once and for all.

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[1] "We do not condone the conduct on the part of the Patriots and the team's head coach, and we likewise refrain from assessing whether the NFL's sanctions (and its alleged destruction of the videotapes themselves) were otherwise appropriate." Pet. App. 28a.

[2] The ruling below also arguably disenfranchises any ticket-holder to any professional sporting event that is rigged or played in violation of the established rules of that league.

[3] *See* Pet. Br. 13, 14 for a description of "Spygate II" which resulted in the firing of the Denver Broncos' head coach after it was discovered that his team conducted similar illegal videotaping.

Respondents Brief in opposition also attempts to minimize the nature of the infraction here by attempting to characterize this litigation as one based on "disappointed subjective expectations." Res. Br. 4. To the contrary, this case is about an objective violation of the NFL's own rules which gives rise to a breach of the ticket-holders' contract. As NFL Commissioner Goodell stated upon learning of the Patriots ongoing cheating: "[t]his episode represents a calculated and deliberate attempt to avoid longstanding rules designed to encourage fair play and promote honest competition on the playing field." Pet. App. 6a, Pet. Br. 8.

There is nothing subjective about this case: the New England Patriots for many years, and with the systematic and ongoing blessing of the entire organization, cheated in direct violation of the NFL's rules. Furthermore, the type of rule violated by the Patriots is classified as an "integrity of the game" rule. The national question of whether consumers have a remedy at law when they purchase tickets to an NFL game that is rigged and played contrary to the NFL's most sacrosanct "integrity of the game" rules can only be decided by this Court. Since the Third Circuit ruled effectively as a matter of judicial policy on a nationally uniform NFL ticket-holder contract, this matter is appropriate for this Court's review.

II. RESPONDENTS WRONGLY DENY THE CONFLICT BETWEEN THE THIRD CIRCUIT BELOW AND OPINIONS IN THE LOWER COURTS OF OTHER CIRCUITS THAT ACCORD FANS FEDERAL AND STATE LEGAL PROTECTIONS.

Respondents want to pretend that there is no conflict between the Third Circuit's opinion below and a developing body of law in the lower courts in other Circuits that gives legal protections to ticket-holders/consumers of professional sports leagues.

The NFL and its teams enjoy massive 21st century revenue from their fan base, but simultaneously want to ensure that their consumers remain under a parsimonious regime of 19th century law that allows fans only a "revocable license" to attend games. Increasingly, federal courts reject this untenable position.

For the last two decades, federal and state courts in other Circuits have held that the rights of ticket-holders/consumers should no longer be cabined by ancient 19th century doctrines. The Third Circuit below, somewhat reluctantly, took a different position. Now is the appropriate time for the Supreme Court to resolve these issues that have been surfacing in litigation for twenty years.

Respondents simply do not want to accept, or have this Court address, how courts in other Circuits have extended protections to ticket-holders/consumers over time. Respondents in their papers repeatedly refer to the "alleged breach of contract" and "alleged

contractual option to renew season ticket package" and "alleged contractual right of season ticket package holder to renew season ticket package" Res. Br. 6.

These rights are not "alleged": they are actual rights conferred by lower federal and state courts in other Circuits on ticket-holder/consumers who have been defrauded or had their season ticket contract rights abrogated by over-reaching NFL owners. Numerous cases now extend these protections to fans of professional sports leagues who pay hard-earned money and loyally attend the games of their favorite teams. Pet. Br. 16-20, Pet. App. 19a, 20a.

As the federal District Court judge ruled in *Brotherson v. Professional Basketball Club, L.L.C.*, 604 F. Supp. 2d 1276 (W.D.Wash.2009): "if a reasonable consumer understood that he or she was buying nothing other than the right to be subject to the unfettered whim of the [the defendant professional basketball team] then no one would have entered into a season ticket package." Pet. Br. 17.

These more modern cases have moved away from the outmoded common law doctrine of "revocable licenses" and firmly recognize that modern day consumers of sporting events enter into elaborate and expensive season ticket contracts. The season tickets packages that modern professional sports teams sell bear no more resemblance to 19th century revocable seat licenses than modern computerized automobiles resemble the horse and buggy.

Since federal courts in other Circuits have found that there exist protections for season ticket holders

against misleading statements by owners, the question that Petitioners seek to have reviewed is whether season ticket holders like Mayer should have protections against paying to witness a game admittedly played in violation of the NFL's own rules. Said question is ripe for review.

III. THE THIRD CIRCUIT OPINION CONFLICTS WITH SUPREME COURT PRECEDENT OF *AMERICAN NEEDLE* AND RESPONDENTS ADMIT THAT FEDERAL RICO CLAIMS WERE PLED AND ARGUED BELOW.

Respondents try to claim that *American NeedleInc. V. National Football League, Et. Al. , 130 S.Ct. 2201 (2010)* was simply a narrow interpretation of anti-trust law. Res. Br. 5. In fact, *American Needle* went to the question of whether federal anti-trust law governed the conduct of the NFL and its teams or whether the league was exempt from federal supervision. The clear import of the decision was whether the NFL is exempt from the normal operation of the law. This Court rejected the NFL's contention that as a self-governing entity it was beyond the reach of law.

This is strikingly similar to the question of whether the federal RICO statute governs the conduct of NFL teams participating in and covering up fraud and racketeering such that spectators witness games that are not played according to NFL rules.

Respondents admit in their papers that federal RICO was pled and reviewed on appeal, thereby making it a live issue in this case. Res. Br. 5

("[Petitioners] only federal law claim was based on the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961")

IV. RESPONDENTS UNDERMINE THEIR OWN POSITION BY RELYING ON THIS COURT'S DECISION IN *MARRONE* INTERPRETING STATE LAW WHILE AT THE SAME TIME MAINTAINING THAT THIS COURT CANNOT OPINE ON STATE LAW AND THEREFORE SHOULD NOT GRANT CERTIORARI.

Respondents, in their brief, contradict themselves.

Respondents proclaim that *Marrone v. Washington Jockey Club of District of Columbia*, 227 U.S. 633 (1913) is valid and binding precedent, even though it turned on a state law issue of whether a ticket to a racetrack constitutes a contract or a revocable license. Res. Br. 4.

At the same time Respondents urge this Court not to grant certiorari because it ought not to reviews questions of state law. Res. Br. 7-8.

As *Marrone* teaches, it is accepted practice for this Court to analyze the applicability of state law. It is even more important in this instance because of the far-reaching national legal and policy implications of

denying any rights to any ticket-holders of professional sporting events.[4]

To the extent that the Third Circuit opinion below and this Court's decision in *Marrone* federalized the law of ticket-holder rights, this Court should revisit the outmoded precedent of *Marrone*. Pet. Br. 22.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[4] Respondents claim that Petitioner waived this argument is false as the Third Circuit *sua sponte* relied on *Marrone* for the proposition that tickets to sporting events are merely revocable licenses with no other rights attached.

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